85-1329

No.

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

GERALD J. YOUNG, GEORGE CARISTE, SOL N. KLAYMINC and NATHAN HELFAND,
Petitioners,

vs.

UNITED STATES OF AMERICA, ex rel. VUITTON ET FILS S.A., and LOUIS VUITTON S.A.
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether interested private attorneys may, consistent with the due process clause of the Fifth Amendment and Fed. R. Crim. P. 42 (b), prosecute criminal contempt proceedings.

2. Whether, pursuant to Fed. R. Crim. P. 42(b), an interested private attorney may direct an unsupervised investigation in order to obtain evidence to be used in a criminal contempt trial.

3. Whether the Court of Appeals erred in affirming criminal contempt sentences of six months to five - years.

PARTIES TO THE PROCEEDINGS

Petitioners, Gerald J. Young, George Cariste, Sol N. Klayminc and Nathan A. Helfand were appellants below.

The Appellees below were Vuitton et Fils S.A. and Louis Vuitton S.A., representing the United States of America.

Petitioner, Barry Dean Klayminc, filed a petition in this court on January 16, 1986, Number 85-6207. This petition raised the same issues as are presented herein. Barry Dean Klayminc was a co-defendant at the trial and a co-appellant in the Second Circuit hearing.

It should be noted that Sol N. Klayminc and Nathan A. Helfand were granted the right to proceed in forma pauperis by the Second Circuit Court of Appeals. However, by mutual agreement, they have joined in this petition for the purposes of simplicity and avoidance of confusion.

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TABLE OF CASES AND AUTHORITIES

Cases

Midway Mfg. Co. v. Kruckenberg (11th Cir.) 779 F2d 624 (January 11, 1986)

Petitioners respectfully refer to the Table of Cases set forth in the Petition of Barry Dean Klayminc, Case No. 85-6207 filed January 16, 1986.

Authorities

Petitioners respectfully refer to the Table of Authorities set forth in the Petition of Barry Dean Klayminc, Case No. 85-6207 filed January 16, 1986.

Petitioners Gerald J. Young, George Cariste, Sol N. Klayminc and Nathan A. Helfand, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATION TO OPINION BELOW

The decision of the United States Court of Appeals for the Second Circuit from which review is sought, was issued on December 16, 1985. The opinion was reported at ___ F.2d ___ and is printed in the joint Appendix attached to this Petition at A-1 - A-49.

JURISDICTION

The judgment of the United States

Court of Appeals for the Second Circuit was entered on December 16, 1985, in Case Number 85-1068, et al. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 42(b) of the Federal Rules of Criminal Procedure, and the Due Process Clause of the Fifth Amendment of the United States Constitution.

Rule 42(b) states:

> **(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable

> time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and described it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall ... be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Barry Dean Klayminc, a co-defendant and co-appellant has filed a Petition for Writ of Certiorari dated January 16, 1986, Case No. 85-6207.

Petitioners Barry Dean Klayminc and Sol N. Klayminc were parties to the injunction in Vuitton et fils S.A. v. Karen Bags, Inc., 78 Civ. 5863 (CLB) which was the object of the contempt action under 18 U.S.C. § 2(401) (3). (Appendix 205-A - 220-A)

Petitioners Gerald J. Young, George Cariste and Nathan Helfand were not parties to the injunction but were convicted of aiding and abetting petitioner Sol N. Klayminc. (Appendix 193-A - 204-A)

The issues presented in the Petition of Barry Dean Klayminc are identical to those raised herein. Each petitioner raised these issues in pre-trial and post-trial motions. Judge Brieant's rulings on these motions are set forth in the Appendix 49-A - 113-A (post-trial) and 115-A - 192-A (pre-trial). Therefore, in the interests of this court's preference for brevity and to avoid inefficient utilization of court time and duplication of effort, these petitioners respectfully make reference and incorporate the statement of the case set forth on pages 1 through 8 of said petition of Barry Dean Klayminc.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH A DECISION OF THE SIXTH CIRCUIT AND INCONSISTENT WITH DECISIONS OF SEVERAL OTHER CIRCUITS

Petitioners respectfully refer the court to pages 8 through 11 of the petition of Barry Dean Klayminc and incorporate said discussion by reference.

The recent case of Midway Mfg. Co. v. Kruckenberg, (11th Circuit, January 10, 1986) 779 F2d 624, also dealt with the propriety of the appointment of private counsel to prosecute contempt actions. The language of the 11th Circuit decision is inconsistent with the decision of the instant case. In Midway, the court remanded the case for redetermination of certain factual issues before consideration of the larger legal issue.

II

THE PRIMARY ISSUES IN THIS CASE INVOLVE QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

A. This Court Should Decide the Propriety of Appointing an Attorney for a Party in an Underlying Civil Suit as Special Prosecutor in a Criminal Contempt Proceeding.

With the recent decision in Midway Mfg. Co. v. Kruckenberg, (11th Cir. 1986), supra, three circuit courts have grappled with this issue within the past ten months. This clearly demonstrates the extreme importance of this issue and the necessity for intervention by the U.S. Supreme Court.

Petitioners respectfully refer the court to the petition of Barry Dean Klayminc page 11 and 12.

B. This Court should Decide the Propriety of Granting a Special Prosecutor the Full Investigatory Powers of the Government.

Petitioners respectfuly refer the court to the petition of Barry Dean Klayminc pages 13 through 15.

C. Rule 42(b) Does Not Permit Appointment of a Private Attorney to Prosecute a Criminal Contempt.

Petitioners respectfully refer the court to pages 15 through 17 of the petition of Barry Dean Klayminc and hereby incorporate said discussion herein.

III

THIS COURT SHOULD REVIEW THE EXECESSIVE AND DISPORPORTIONATE SENTENCES IMPOSED ON PETITIONERS.

Petitioners contend each of their sentences were excessive. These petitioners refer the court to pages 18 through 19 of the brief of petitioner Barry Dean Klayminc and incorporate said arguments by reference in asking this court to review each of their sentences as follows:

Sol Klayminc - Five (5) years

Gerald J. Young - Two and one-half (2-1/2) years

George Cariste - Six (6) months

Nathan Helfand - Nine (9) months

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request the

issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1351, 1312, 1305, 1294, 1354
August Term, 1984

Argued: June 14, 1985
Decided: December 16, 1985

Docket Nos. 85-1068, 85-1075, 85-1076
85-1077, 85-1078

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UNITED STATES OF AMERICA ex rel.
VUITTON ET FILS S.A., and
LOUIS VUITTON S.A.,

Appellee,

- against -

BARRY DEAN KLAYMINC, NATHAN HELFAND,
GEORGE CARISTE, SOL N. KLAYMINC, and
GERALD J. YOUNG,

Appellants.

----------x

Before: LUMBARD, OAKES, and WINTER,
Circuit Judges.

Appeal from criminal contempt convictions by jury in the Southern District of New York (Charles L. Brieant, J.) for violating a permanent injunction

prohibiting trademark infringement in a case prosecuted by private attorneys of the trademark owner appointed by the Court under Fed. R. Crim P. 42(b).

Affirmed.

Judge Oakes dissents in a separate opinion.

James A. Cohen (Washington Square Legal Services, Inc., New York, N.Y., Paul Davison, Samia Fam, Lauren G. Gross, Michael Abelson, Carla Hinton, Legal Interns, New York University School of Law, of counsel), for Appellant Barry Dean Klayminc.

Thomas R. Matarazzo, Brooklyn, N.Y., for Appellant Helfand.

Mitchel B. Craner, New York, N.Y., for Appellant Cariste.

William P. Weininger, New York, N.Y. (Samuel & Weininger, New York, N.Y., Walter Kraslow, of counsel), for Appellant Sol N. Klayminc.

Leonard J. Comden, Tarzana, California (Wasserman, Comden & Casselman, Tarzana, California, of counsel), for Appellant Young.

J. Joseph Bainton, New York, N.Y. (Robert P. Devlin, Steven H. Reisberg, Karen J. Pordum, Law Student, New York, N.Y., of counsel), for Appellee.

LUMBARD, Circuit Judge:

Sol Klayminc and four confederates appeal their convictions on a jury verdict for criminal contempt under 18 U.S.C. § 401(3) (1982), based upon violations, or the aiding and abetting of violations, of a permanent injunction of the Southern District, filed July 30, 1982, which prohibited infringement of the trademark of Louis Vuitton S.A., the well-known French manufacturer of high fashion handbags and other leather goods. The appellants received sentences ranging from six months to five years. Central to their appeals is the claim that the

district court's appointment of Vuitton's attorneys as special prosecutors under Fed. R. Crim. P. 42(b) violated appellants' due process right to a disinterested prosecutor and that the court exceeded its authority by approving the special prosecutors' use of a "sting" operation fashioned along the lines of Abscam.

We find that the district court acted within its discretion in appointing Vuitton's attorneys to prosecute, and that it was within the court's authority to approve a sting operation. As none of the other claims of error require reversal of any of the convictions, we affirm the judgments of the district court.

Because Judge Brieant has discussed the case extensively in two opinions, United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 592 F. Supp.

734 (S.D.N.Y. 1984) ("Vuitton I"), and United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 602 F. Supp. 1052 (S.D.N.Y. 1985) ("Vuitton II"), and because we agree with his rulings, we briefly recapitulate the history of Vuitton's efforts to protect its trademark from infringement by counterfeiters.

Vuitton first brought suit in the District Court for the Southern District in December, 1978, against Sol Klayminc and his family-owned businesses, Karen Bags, Inc. and Jade Handbag Co., Inc., alleging that they were manufacturing imitation Vuitton goods for sale and distribution. Vuitton obtained a preliminary injunction the same month. Sol's wife, Sylvia, his son Barry, and Jak Handbag, Inc., another family owned business, were subsequently joined as defendants. Proceedings were then stayed

to await the outome of litigation in the Ninth Circuit regarding the validity of Vuitton's trademark. After the trademark was found valid in Vuitton et Fils S.A. v. J. Young Enterprises, 644 F.2d 769 (9th Cir. 1981), the parties, in July 1982, entered into a settlement agreement pursuant to which the defendants agreed to pay Vuitton $100,000 in damages. Defendants also consented to the issuance of a permanent injunction which enjoined them from, inter alia, "manufacturing . . . selling, offering for sale . . . any product bearing any simulation . . . of Vuitton's Registered Trade-Mark 297,594."

In early 1983, Vuitton, Gucci Shops, Inc., the manufacturers of Calvin Klein jeans and certain other owners of prestigious trademarks were contacted by Kanner Security Group, Inc., a Florida investigation firm whose principals are

former FBI agents. Kanner proposed a plan to ferret out possible infringers by means of a "sting" operation subsequently dubbed "Bagscam"; the firm was subsequently retained. The main operatives in this sting operation were Melvin Weinberg and Gunner Askeland, a former FBI agent, both of whom had been involved in Abscam. Operating under the supervision of Vuitton attorney J. Joseph Bainton, Weinberg and Askeland posed as purchasers of counterfeit goods (using the assumed names "Mel West" and "Chris Anderson") and in this way they penetrated a network of counterfeiters that included Sol and Barry Klayminc and the other appellants.

Weinberg, posing as "Mel West," had a number of telephone conversations with appellant Nathan Helfand in which Weinberg explained that he and Askeland were interested in buying counterfeit

goods. Helfand told Weinberg that he would talk to a man named "Sol" who had been in trouble with Vuitton in the past, but was planning to produce counterfeit Vuitton and Gucci goods in Haiti.

Helfand had a dinner meeting with Sol and Sylvia Klayminc in Florida on March 27, 1983 at which they discussed the sale by Sol of counterfeit Vuitton and Gucci wares and the possible investment by Weinberg and Askeland in the Haitian factory. Sol signed a memorandum describing in detail the present and proposed nature of the operation at the factory and another memorandum detailing the anticipated cost to Weinberg and Askeland of the counterfeited goods. At this meeting Sol also delivered to Helfand some sample counterfeit Vuitton bags for Weinberg's and Askeland's inspection. Sol explained to Helfand that additonal imitation

Vuitton products purchased from Sol could be picked up from a man named "George" (appellant George Cariste) in New Jersey. Sol also stated that his son, Barry, had a 25 percent interest in the Haitian operation. From the reported conversations it was apparent that both he and his confederates were aware of the permanent injunction.

On March 31, 1983, Bainton requested the court to appoint him and his associate Robert P. Devlin as special prosecutors in a criminal contempt proceeding pursuant to Fed. R. Crim P. 42(b). Bainton's affidavit recited in detail the developments summarized above, which Helfand had reported to Askeland and Weinberg. Bainton pointed out that both he and Devlin had previously been

appointed by the court to prosecute Sol Klayminc for criminal contempt.[1]

Judge Lasker, acting in place of Judge Brieant (the assigned judge who was absent), found on the strength of Bainton's affidavit that there was probable cause to believe that the alleged criminal contemnors were knowingly in violation of the court's permanent injunction; he appointed Bainton and Devlin to prosecute the case in an order dated March 31, 1983.

Desiring to sew up the case, but

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1. Judge Brieant had appointed Bainton and Devlin on July 8, 1981 to prosecute Sol Klayminc and his family-owned businesses for their criminally contemnacious conduct in selling counterfeit Vuitton goods in defiance of the court's December 12, 1978 preliminary injunction. The case was tried as a petty offense before a United States Magistrate on July 22, 1982. Klayminc and the corporate defendants were convicted, but the Magistrate suspended the sentences upon hearing that the underlying civil action had been settled.

concerned about the ethical prohibition against private attorneys making surreptitious recordings, see 20th Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81, 93 n.17 (2d Cir. 1984), cert. denied, 105 S. Ct. 1755 (1985); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974), Bainton also sought the court's permission to continue the undercover investigation and videotape the results. He detailed in his affidavit the next step in the investigation: a meeting arranged to take place at the Plaza Hotel in New York on April 5, 1983, among Sol, Barry, Askeland, and Weinberg to which Sol had been requested to bring twenty-five counterfeit Vuitton bags. The court's order empowered counsel to undertake "further investigation" of the alleged counterfeiting and to follow through with

the activities detailed in Bainton's affidavit.

When Judge Brieant returned, Bainton, on April 6, apprised him of Judge Lasker's order and the continuing investigation. Judge Brieant suggested that Bainton bring the investigation to the attention of the United States Attorney's Office. By letter dated that same day, Bainton informed Lawrence Pedowitz, the Chief of the Criminal Division of the United States Attorney's Office for the Southern District, of the investigation and offered to make any tape recordings or other evidence available to his office.[2] Pedowitz did

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2. Because the investigation required some undercover work in California, Bainton also contacted John Kildeback of the District Attorney's Office in Los Angeles to discuss the California law applicable to planned electronic eavesdropping by federal agents. Kildeback confirmed that the planned investigatory activities would present no problem under California law.

not take any action, but simply wished Bainton good luck. Judge Brieant noted that the United States Attorney's Office was again contacted about the case on the eve of trial, but indicated no desire to enter the case.

Thus, approved by court order, "Bagscam" went into full operation. Over the course of a month, numerous video and audio tape recordings were made of meetings and phone calls between appellants and the investigatory team. These recordings later enabled the jurors to see and hear a graphic account of the meeting at the Hotel Plaza on April 5 and the sale, for $25.00 apiece, of 25 imitation Vuitton bags to "Mel" by Sol. Mel later put up $5,000 to help Sol get his Haitian factory going to make more "L's" or "LV's", as the counterfeit bags were known.

Based, in part, on his April 26, 1983 report to Judge Brieant describing the contents of the recordings, Bainton requested, and the judge signed, an Order to Show Cause why the five appellants, as well as several corporate entities and two other individuals, David Rochman and Robert Pariseault, should not be cited for civil and criminal contempt for either violating or aiding and abetting the violation of the July 30, 1982 permanent injunction.

The defendants filed pre-trial motions opposing the Order to Show Cause and the appointment of Bainton and Devlin as special prosecutors. Oral argument was heard October 31, 1983. On April 9, 1984, Judge Brieant denied all the pre-trial motions. Vuitton I, supra. Rochman and Pariseault subsequently entered guilty pleas.

At the jury trial before Judge Brieant in May 1984 the government presented its evidence regarding the tapes and conversations through Weinberg and Rochman. Weinberg was extensively cross-examined for three days.

The defense presented no testimony contradicting any of the events detailed in the videotapes and in Weinberg's testimony. Sol Klayminc, Barry Klayminc, Nathan Helfand and Gerald Young did not take the stand. The only defendant who testified was George Cariste, who claimed that he had no knowledge of the court's injunction.

Following their convictions by the jury, defendants submitted post-trial motions. On January 24, 1985, Judge Brieant denied the motions. Vuitton II, supra.

Defendants claim on appeal that the special appointment of Bainton and Devlin

violated their due process right to an impartial prosecutor. As a fallback, they contend that even if a court can appoint an interested attorney to prosecute a criminal contempt, the court does not have the power to invest that attorney with extraordinary investigative privileges. Appellants maintain that such privileges should be reserved for, and supervised by, experienced and accountable law enforcement authorities, not subject to abuse by private parties who seek to enhance their positions in related civil actions. To illustrate their concerns, appellants argue that Weinberg received sketchy instructions on how to conduct the "sting", that Weinberg both misrepresented the terms of the injunction to appellants and created ambiguities in the evidence, and that he asked numerous extraneous questions relevant not to the criminal contempt but

to two civil proceedings: a $2.25 million defamation action by Sol Klayminc against Bainton and his law firm and Vuitton's challenge to Sol Klayminc's discharge of debts in voluntary bankruptcy.

Appellants' first argument founders on our decision in Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982) where we held that it was proper for the district court to appoint as special prosecutor the counsel for civil plaintiffs in the copyright litigation that had resulted in the injunction allegedly violated. Appellants urge us to overrule Musidor. We decline to do so. The practice of appointing such counsel as prosecutor has a long history in this circuit. The attorney will usually be the court's only source of information about contempts occurring

outside the court's presence. See McCann v. New York Stock Exchange, 80 F.2d 211, 214 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936). Counsel for the plaintiffs are already fully informed and ready to go forward without delay. The district court is already aware of their competence and can make further inquiry if needed. Here, the qualifications of Bainton and Devlin were obvious and known to the court.

Appellants contend that in Musidor we did not fully appreciate the importance of the defendant's right to a disinterested prosecutor. The Musidor court, however, appropriately recognized that that right is not absolute. Although a prosecutor is charged with the duty not to win but to seek justice, Berger v. United States, 295 U.S. 78, 88 (1935), he hardly comes to the prosecution with an open mind. As we

stated in Wright v. United States, 732 F.2d 1048 (2d Cir. 1984), cert. denied, 105 S. Ct. 779 (1985) "If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury -- not the prosecutor." Id. at 1056 (citation omitted). The possibility that impermissible personal considerations may influence a prosecutor's decisions does not necessarily deprive a defendant of due process: "The constitutional interests in accurate findings of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor and not the judge, who is offered an incentive for securing civil penalties." Marshall v. Jerrico,

Inc., 446 U.S. 238, 248-49 (1980).

We are not persuaded that Bainton and Devlin were disqualified by their past connections with Vuitton's business, their involvement in previous lawsuits with the defendants, or by any of their conduct in this lengthy litigation. The record reveals that the actions they took in the interests of their client and in support of the court's orders were fully justified by what they had discovered regarding the defendant's activities. The fact that Sol Klayminc had brought suit against Bainton in the New York courts alleging harassment and other acts is entitled to no weight as the suit was clearly frivolous; it was never pressed, and was finally dismissed by consent.

Prosecutors appointed under Fed. R. Crim. P. 42(b) are particularly susceptible of judicial control. They are under close judicial scrutiny as was

the case here. By the very act of appointing a special prosecutor, the judge plays a key role in the decision about whether to prosecute. Hence, the prime danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations is practically nil.

Judge Brieant conducted the proceedings and the trial with a sharp eye toward ensuring that appellants were "accorded all the protections given to other criminal defendants." Vuitton I, 592 F. Supp. at 746. The Order to Show Cause, supported by Bainton's affidavit, gave ample notice that appellants were charged with criminal contempt under 18 U.S.C. § 401(3) because of certain enumerated acts. Appellants had nearly thirteen months to prepare for trial. When they expressed concern that exculpatory Brady material might be

within the Bainton/Vuitton attorney-client privilege, Judge Brieant ruled that such material would not be privileged. 592 F. Supp. at 746-47.

We are not persuaded by the recent opinion of the Sixth Circuit in Polo Fashions, Inc. v. Stock Buyers International, Inc., 760 F.2d 698 (6th Cir. 1985). That court held that it is an abuse of discretion for a district court to appoint an attorney for a party in an underlying civil case as the sole or primary prosecutor in a related criminal contempt proceeding. The court emphasized that its holding was based on its supervisory authority over the Sixth Circuit. The court expressly did not decide that the appointment of an interested prosecutor in a criminal contempt proceeding violates the due process clause.

The government's case, relying as it did principally on tape recordings of what the defendants said and did, was so strong and convincing that the defendants can say little or nothing about the evidence except to complain that the court must not soil itself by approving the use of evidence obtained by deceit and misrepresentation. Defendants also argue that although such evidence might be received if it has been developed under the supervision of some government prosecutor, it ought not to be received where appointed counsel acts as the prosecutor. Laying aside the obvious rejoinder that it ill becomes defendants who have shown so little regard for the majesty of the law and the orders of a federal court to be concerned about such matters, we find this argument to be completely without merit.

The special prosecutor should have the same power to gather evidence and present that evidence to the court as does any other government prosecutor. Appellants fail to cite any cases in which Rule 42 has been construed to limit the powers of the special prosecutor in this regard. In the absence of legislative history or some compelling reason that supports appellants' argument, we decline to draw a distinction between the United States Attorney and the court appointed prosecutor that is not contemplated by the literal language of Rule 42. The Rule's use of the term "to prosecute" applies to both types of government prosecutors mentioned therein and the common sense meaning of the term clearly encompasses the power to investigate and gather evidence through activities such as the Bagscam sting supervised by

Bainton and Devlin.

Moreover, the district court was fully familiar with the use of evidence obtained through sting operations by virtue of this court's scrutiny and use of evidence similarly obtained in the Weinberg-managed "Abscam" sting. We affirmed convictions based on such evidence in United States v. Myers, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). See also United States v. Kelly, 707 F.2d 1460 (D.C. Cir.), cert. denied, 104 S. Ct. 264 (1983); United States v. Williams, 705 F.2d 603 (2d Cir.), cert. denied, 104 S. Ct. 524, 525 (1983); United States v. Jannotti, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982). Nor is there any reason to believe that counsel who acted for the government in this case and who supervised the sting operation under the eye of the court and with its

approval, did anything unethical or in violation of the Canons of Ethics. We therefore reject appellants' objections to the appointment of the special prosecutors and their supervision of the investigation.

Each of the appellants also challenges the sufficiency of the evidence supporting his conviction. We reject these challenges. Sol Klayminc obviously knew of the injunction since he consented to it. His conduct in selling the 25 counterfeit bags to Weinberg at the Plaza Hotel, as well as his offering to sell in the United States counterfeit bags manufactured in Haiti, clearly violated the injunction.

The four other appellants were tried and convicted of willfully aiding and abetting Sol Klayminc's violation of the injunction. See 18 U.S.C. § 2(a)(1982). There is no doubt as to Barry Klayminc's

knowledge of the injunction; Barry alleges, instead, that Judge Brieant incorrectly charged the jury on the standard for aiding and abetting and that, in any event, there was insufficient evidence of acts on his part aiding and abetting his father's violation of the injunction.

Conviction for aiding and abetting requires participation in an actual violation of the injunction, not just a plan to violate it. Barry argues that Judge Brieant erred in instructing the jury that it could convict defendants for aiding and abetting if, among other things, the jury found that defendants "did something . . . in furtherance of a . . . scheme or plan to violate the injunction order." Barry has unduly focused on one line of a long charge which accurately and completely informed the jury.

Because the scope of the injunction is very broad and prohibits even offers to sell counterfeit Vuitton goods, the jury could reasonably have found that Barry participated in actual violations of the injunction. Cariste testified that he and Barry met with Askeland and Weinberg on April 19, 1983 to discuss a plan to offer counterfeit Vuitton bags for sale in the United States. Later, Barry telephoned Cariste to request that he cut patterns for the Vuitton dies. Barry also aided his father's attempts to secure Weinberg as a buyer of imitation Vuitton goods by assuring Weinberg that Barry would take over for Sol if Sol became unable to manage the Haitian factory.

There was no reason for Judge Brieant to charge the jury, as Barry argues, that the injunction prohibited only <u>contractual</u> offers to provide

counterfeit Vuitton goods. In the absence of any indication that the injunction intended anything but the commonly understood meaning of the term "offer", the judge's failure to give the requested instruction was not error.

There was also ample evidence to support the other convictions. Young had a longstanding relationship with Sol Klayminc and his statement that "if [Klayminc] would have listened to me, he wouldn't have had those troubles" (Tape 2, April 14, 1983) supports the inference that Young knew of the injunction. Young also argues that Judge Brieant erred in admitting, under the co-conspirator exception to the hearsay rule, evidence of a telephone conversation between Weinberg and Sol Klayminc in which Klayminc discussed Young's involvement in civil litigation with Vuitton in California. We think that the evidence

was properly admitted as Young's prior experience with Vuitton litigation was relevant to the question of his knowledge of Klayminc's injunction. Nor may Young complain that the judge failed to instruct the jury of Young's ultimate "withdrawal" from the Haitian counterfeiting project. Even if we accept Young's assertion that he withdrew, this would not be a defense because the purported withdrawal took place after Young had committed the various acts of contempt for which he was convicted.

That Cariste had knowledge of the injunction is supported by Cariste's close association with Sol Klayminc at the time the injunction was entered in 1982 and by the trial testimony of Weinberg and David Rochman. Weinberg testified that Cariste had told him that Klayminc sold his Vuitton dies to Cariste

when Klayminc first got in trouble with Vuitton. Rochman testified that Cariste had mentioned the injunction at an April 12, 1983 meeting. Cariste participated in meetings with Askeland and Weinberg at which the parties discussed the manufacturing of counterfeit Vuitton goods and it was Cariste who supplied the 25 imitation bags to Sol for sale at the April 5, 1983 meeting at the Plaza Hotel.

Helfand was a close associate of Sol Klayminc, and he knew that Klayminc had had trouble with Vuitton in the past. Rochman testified that in the first week of April, 1983 he and Helfand discussed Sol Klayminc's counterfeiting operation and the fact that Klayminc was at that time under an injunction prohibiting him from infringing Vuitton's trademark. In light of the evidence of Helfand's knowledge of the injunction and of his activities as go-between for Weinberg and

Sol Klayminc, there was ample evidence to support his conviction.

Finally, each appellant challenges the propriety of the sentence imposed on him. The primary contention here is that Judge Brieant relied upon an improper consideration -- the vindication of Vuitton's property rights -- in passing sentence. While the fundamental consideration in punishing criminal contempt is protecting the court's authority, it is also appropriate for a court to consider both the consequences of the violation of the injunctions and the importance of deterring such acts in the future. See United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947). The sentences imposed by the judge reflect a range of punishment that comports with each defendant's culpability. In light of the defendants' deliberate flaunting of the law over an

extended period of time and in light of their calculated acts in violation of the court's injunction, the sentences are not excessive.

We have considered the other arguments raised by the appellants and find them to be without merit.

Judgments affirmed.

Vuitton et Fils S.A. v. Klayminc, 85-1068 et al.

OAKES, Circuit Judge (dissenting)

I am required to dissent.

In my mind, the most difficult question that this case presents is whether it is legitimate for a court in the exercise of its criminal contempt powers to place its imprimatur on a sting operation that has already begun under the supervision of private attorneys and that will continue to run without effective judicial oversight. In the court below, Judge Brieant found that Judge Lasker's earlier approval of such an operation was appropriate and also saw no reason why it should matter whether an investigation occurs before or after the court appoints a special prosecutor, so long as the investigation proceeds with respect for defendants' constitutional rights. United States ex rel. Vuitton et

Fils S.A. v. Karen Bags, Inc., 592 F. Supp. 734, 743 (S.D.N.Y. 1984) (Vuitton I); see also United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 602 F. Supp. 1052, 1055-56 (S.D.N.Y. 1985) (Vuitton II). I see the issue as slightly more complicated. I believe the timing of the appointment and the extent of judicial oversight are of critical importance. Moreover, I believe that there are compelling reasons against court approval of such an operation: the private lawyer who participates in a sting operation almost necessarily runs afoul of the canons of legal ethics; the private lawyer who represents an interested party also lacks the knowledge of legal constraints on the investigatorial process and freedom from bias that a public prosecutor would have. A court should approve a sting operation only when it has determined that there is

a strong showing that a court order has been violated and where there is no other way of catching the contemners. Such approval should also be conditioned on observance of strict guidelines.

Judge Lasker's decision to authorize further investigation on the part of Vuitton is certainly understandable. This court had already held that in criminal contempt proceedings counsel for interested parties may in appropriate circumstances be appointed special prosecutors. See Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982). Moreover, Sol Klayminc had previously violated a court order barring him from counterfeiting Vuitton goods. Nonetheless, attorneys for Vuitton should not have been vested with the investigatory powers of prosecutions. As indicated above, a number of factors must

be balanced against the interest in catching contemners, and, in this case, those factors should have been found to be predominant.

Thus, in a situation such as this, the court should have considered the possibility that Vuitton's campaign against would-be counterfeiters would not be thwarted by denying its attorneys sweeping investigatory powers. First, other methods of investigation would remain open. For instance, in Musidor, 658 F.2d 60, the key testimony came from a private investigator who never practiced any deception: he conducted surveillance, trailed a van, and purchased one of the items bearing the protected trademark from the back of the van. Second, a company like Vuitton, that has proved over and over again just what kind of counterfeiters it is up against, see In re Vuitton et Fils S.A.,

606 F.2d 1, 2 (2d Cir. 1979), could conceivably obtain judicial authorization before beginning the sting, although several cases and commentators have advanced the convincing contention that sting operations may be justified only to combat activities threatening "grave harm to our society," such as the corruption of public officials. United States v. Kelly, 707 F.2d 1460, 1473 (D.C. Cir.), cert. denied, 474 U.S. 908 (1983); see also United States v. Myers, 692 F.2d 823, 843 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983); Blecker, Beyond 1984: Undercover in America -- Serpico to Abscam, 28 N.Y.L. Sch. L. Rev. 823, 975-82 (1984).[1]

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1. I note that after the order issued in this case, remedies against counterfeiters were unquestionably strengthened by the Trademark Counterfeiting Act of 1984. Pub. L. No. 98-473, §§ 1501-1503, 98 Stat. 2178

[footnote continues on following page]

Another factor to be considered in a case such as this is whether the court should refuse to approve an ongoing investigation in which lawyers may have previously violated ethical norms (as it appears, concededly in hindsight, Vuitton's lawyers did here). A lawyer has the general duty not to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Model Code of Professional Responsibility DR 1-102(A)(4) (1980); see also Model Rules of Professional Conduct Rule 8.4(c) (1983). He also has the specific duty not to "knowingly make a false statement of law or fact." Model Code DR 7-102(A)(5); see

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1. [continued from previous page]

(codified at 15 U.S.C.A. §§ 1116-1118, 18 U.S.C.A. § 2320 (West Supp. 1985)). In future cases, this law must be taken into account in considering the alternate remedies available to trademark holders.

also Model Rule 4.1(a). These duties of lawyers exist even when the lawyers are not acting in their capacity as such. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 336 (1974) (duties of lawyers in respect to Watergate activities). In the words of Justice Frankfurter,

> It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."

Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring). I believe that the duty to refrain from conduct that involves dishonesty, fraud, deceit, or misrepresentation and the duty to speak

the truth should preclude a private attorney from participating in a sting operation without first receiving court approval. Moreover, those fundamental tenets of the legal profession mandate that such approval be granted rarely and only under exceptional circumstances.

Nor is it available to argue that the chicanery here was performed by an investigative firm rather than by counsel themselves. As attorney Bainton's affidavit in support of his motion seeking appointment as a special prosecutor and judicial approval of the investigation makes clear, these operations were conducted with his knowledge and approval. In addition, there is some suggestion in the record that the course of conduct by the Kanner security firm was not only ratified by Vuitton's counsel, but that it was in part directed by them. In either case,

attorneys who employ such a firm must be held to bear responsibility for the firm's use of techniques that would be ethical violations if utilized by the attorneys directly. Lawyers cannot escape responsibility for the wrongdoing they supervise or ratify by asserting that it was their agents, not themselves, who committed the wrong. The history of Watergate eloquently demonstrates that lawyers have the capacity to perpetrate lawlessness by directing the behavior of others; the conviction of certain of Watergate's lawyer-defendants, see, e.g., United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976) ("plumbers" break-in at Ellsberg's psychiatrist's office), cert. denied, 429 U.S. 1120 (1977); United States v. Liddy, 509 F.2d 428 (D.C. Cir. 1974) (original Watergate break-in and wiretapping), cert. denied, 420 U.S. 911 (1975), evidences the fact that the

lawyer who guides others into or profits by illicit behavior bears responsibility for acts done under his supervision. Such responsibility accords with agency law. See Restatement (Second) of Agency § 217D (1957) (principal may be subject to penalties for criminal acts of agents). It accords with the canons of legal ethics. See Model Rule 5.3 (lawyer responsible for the misconduct of nonlawyer employees or associates if the lawyer orders or ratifies the conduct); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1320 (1975) (deeming it unethical for lawyer to have his investigator tape colloquy with sales clerk without clerk's knowledge). Most basically, it accords with the obligations and duties of lawyers in our society.

In reviewing Vuitton's attorney's application for approval of the

investigation, the court should also have considered the possibility of imposing guidelines for and limitations on that investigation. If such an operation is to be approved, guidelines are necessary. Respect for the court, the end goal of contempt, may be diminished when a court approves an open-ended investigation by attorneys unrestrained by either institutional guidelines or the court's own specific guidance. The Rule 42 order read in part (emphasis added): "ORDERED that J. Joseph Bainton, Esq., and Robert P. Devlin, Esq., . . . are hereby specially appointed to represent the United States of America in connection with the further investigation of the alleged aforesaid criminally contumacious course of conduct and the ultimate prosecution therefor . . . ." Obviously, such a broad order must be construed to permit only lawful investigations, and I

will assume that Bainton and Devlin so understood it. See Vuitton I, 592 F. Supp. at 743. Indeed, the attorneys, to their credit, anxious to remain within the bounds of California law, did secure the supervision of the Los Angeles District Attorney over their electronic eavesdropping in California. But a lawful investigation may still fall far short of the careful investigation a judge would or should approve in advance; once the evidence is in, courts have a "well-established reluctance to dismiss criminal prosecutions because of faulty Government investigation." United States v. Myers, 692 F.2d at 843. The standard appropriate in reviewing a completed investigation is not, however, the appropriate one for a court to use when it approves an investigation in advance. In the latter situation, there is no reason for the court not to require that

the investigation be conducted with the utmost scrupulousness and respect for individual rights.

There are, however, I hasten to add, certain inherent problems with the decision to authorize an investigation conducted by attorneys for private parties. When there is a history of bitter litigation between the parties under investigation and the clients of the attorneys conducting the investigation, as there is in this case, a certain amount of animus against those being investigated on the part of the attorneys is all but inevitable. At the same time, those attorneys will frequently lack knowledge of all the limits that our laws require prosecutors to observe. Through inclination and ignorance, as well as lack of responsibility to the public, to higher authorities or to an electorate, or a

combination of these, private attorneys are likely to fail to exhibit the self-restraint in conducting an investigation and the candor in admitting errors that are required of prosecutors and are of critical importance if our system is to work properly. Indeed, just such an argument was utilized in Judge Lumbard's and my recent RICO opinion in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 497 (1984), reversed on other grounds, 105 S. Ct. 3275 (1985). Attorney Bainton's affidavit in support of his motion seeking judicial approval of the investigation illustrates the problems with placing too great a faith in interested private attorneys. That affidavit clearly indicates that the court order barring counterfeiters was being violated. My reading of the record indicates instead that the defendants here had probably not violated the

earlier order at that time and that the investigation may have been the proximate cause of the violation. Hindsight at least demonstrates the need for caution.

In the end, I am concerned not so much by this case -- much less by these defendants' plights -- as by the thought that courts may put their stamps of approval on whatever undercover tactics lawyers or their hired investigators may devise short of the outrageous or illegal. Authorizing the nearly-outrageous and barely legal can hardly be said in the long run to preserve the dignity of the courts or secure their position of respect.

It is my belief, therefore, that the decision authorizing Bainton and Devlin to continue their investigation was incorrect. Accordingly, I would reverse the judgment.

Vuitton et Fils S.A. v. Klayminc, 85-1068

UNITED STATES of America, ex rel., VUITTON ET FILS S.A.,and Louis Vuitton S.A., Plaintiffs,

v.

KAREN BAGS, INC., Jade Handbag Co., Inc., Sol N. Klayminc and Jak Handbag Inc., Defendants and Alleged Criminal Contemnors,

and,

Barry Dean Klayminc, Gerald J. Young, George Cariste, S.M.E., S.A., Crystal, S.A., David Rochman, Robert G. Pariseault, Esq. and Nathan Helfand, Additional Alleged Criminal Contemnors.

No. 83 Cr. Misc. 1, p. 22-CLB.

United States District Court, S.D. New York

Jan. 24, 1985.

J. Joseph Bainton, New York City, Specially Appointed, for U.S.

Reboul, MacMurray, Hewitt, Maynard & Kristol, New York City, for plaintiffs.

William Weininger, Samuel & Weininger, New York City, for defendant Sol Klayminc.

James A. Cohen, Washington Square Legal Services, Inc., New York City, for defendant Barry Klayminc.

Leonard Comden, Wasserman, Comden & Casselman, Encino, Cal., for defendant Gerald Young.

Mitchell B. Craner, New York City for defendant Nathan Helfand.

Thomas Matarazzo, Brooklyn, N.Y., for defendant Nathan Helfand.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

As is set forth more fully in this Court's Memorandum Decision and Order dated April 9, 1984, United States v. Karen Bags, Inc., 592 F.Supp. 734 (S.D.N.Y.1984) (Hereinafter "Prior Order"), familiarity with which is assumed, these criminal cases arise out of the sales of counterfeit Louis Vuitton products and the campaign waged by Vuitton et Fils S.A. ("Vuitton") to protect its trademark and profits. On July 22, 1982, Sol Klayminc was sentenced before Magistrate Bernikow in this district, for criminal contempt, a crime

based on Sol Klayminc's continuing to sell, or offer for sale, counterfeits in violation of an injunction issued in December 1978. As part of the settlement agreement in an underlying civil action, Vuitton et Fils S.A. v. Karen Bags, Inc., et al. (78 Civ. 5863), Sol Klayminc, his wife Sylvia, his son Barry, and the family-owned corporate defendants agreed to entry of a permanent injunction, which was then issued on consent by Judge Lowe of this court on July 30, 1982. Undeterred, Sol Klayminc again became a criminal defendant charged with disobeying the July 1982 injunction.

After conducting a civil investigation, and concluding that wrongdoing by the Klaymincs and others had continued (Affidavit of J. Joseph Bainton, Esq., sworn to March 30, 1983), attorneys for Vuitton sought permission to investigate and prosecute the

defendants named herein for their allegedly criminal acts in violation of the July 1982 injunction. 18 U.S.C. § 401(3). On March 31, 1983, Judge Lasker granted attorney Bainton's application to be appointed Special Prosecutor. Rule 42(b), F.R.Crim.P. The criminal actions proceeded, step by step, to trial by jury.[1]

This Court conducted a nine-day trial which concluded on May 24, 1984. The trial jury returned verdicts of guilty against defendants Sol Klayminc, Barry Klayminc, Gerald Young, George Cariste, and Nathan Helfand. All of these defendants now move the Court to

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1. It should be noted that the recently enacted Comprehensive Crime Control Act of 1984, P.L. No. 98-473 (October 12, 1984), makes intentional trafficking in counterfeit goods following its enactment, a crime punishable by fine and imprisonment up to five years. 18 U.S.C. § 2320.

set aside the verdicts, Rule 29(c), F.R.Crim.P., to dismiss the Order to Show Cause under which the United States initially accused the defendants of criminal contempt, and/or to order a new trial. Barry Klayminc and Nathan Helfand also move for a "due process" hearing. The Court will treat separately the various challenges to the convictions obtained by the Government's Special Prosecutor.

Due Process

Barry Klayminc and other defendants who are deemed to have joined in this motion argue that the prosecution of these cases violated defendants' due process rights under the Fifth Amendment to the United States Constitution. The grounds for this argument include (1) erroneous appointment of Vuitton's private attorney as a special prosecutor; (2) outrageous conduct by government

agents; (3) excessive and improperly supervised investigative techniques; and (4) "targeting" of defendants who were "urged" to violate the law. (Defendant Barry Klayminc's Memorandum of Law, Filed August 3, 1984; Defendant Gerald Young's Memorandum of Law, filed August 1, 1984).

Many of defendants' due process claims were presented to the Court in pre-trial motions and have been addressed in the Court's Prior Order, 592 F.Supp. at 740-49. Nevertheless, counsel for Barry Klayminc has insisted by motion and by letters received as recently as December 10, 1984, that the "sting" operation conducted by the Special Prosecutor is marred by unconstitutional features.

Defendants' first contention, concerning the propriety of the appointment pursuant to Rule 42(b), F.R.Crim.P., is discussed fully in the

Prior Order. The appointment was authorized under the principles enunciated in Musidor B.V. v. Great American Screen, 658 F.2d 60 (2d Cir.1982), cert. denied, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 656 (1982). Once the appointment was approved by Judge Lasker, and upheld as lawful in this Court's Prior Order, no purpose is served for defendant Klayminc to continue to state that "it was actually a private party that conducted the sting. The fact that it was a private party that conducted the operation and not the government, while it goes a long way toward explaining the shortcomings of the investigation, at the same time makes those shortcomings [sic] more offensive and less tolerable." (Defendant Barry Klayminc's Memorandum of Law, filed August 3, 1984 at 25). There is no merit to this argument. It was not a private

party conducting the sting; it was a specially appointed prosecutor acting on behalf of the United States.

Contrary to defendants' view, this Court is not persuaded that any new information has been discovered at or after trial that impugns the integrity of the Special Prosecutor or highlights any alleged conflicts of interest rendering the appointment invalid. Barry Klayminc points to tape-recorded conversations between the government agent (Mel Weinberg, of Abscam fame) and the defendants which display an "unseemly curiosity" regarding the defamation action filed by Sol Klayminc in state court against attorney Bainton. In addition Barry Klayminc points to similar conversations in which the pending bankruptcy concerning Debtor Sol Klayminc is discussed. These conversations, it is argued, reveal abuses by the Special

Prosecutor who utilized the government investigation to advance his own interests and the interests of his private client, Vuitton.

Taken in proportion to the whole of the extensive tape recordings made during the sting, the conversations to which defendants object are no more and no less than portions of a continuing Runyonesque dialogue between the undercover agent and the defendants. There is no basis for inferring that Bainton was using the government investigation "to seek out and attempt to eliminate personal enemies." Records in the Supreme Court of the State of New York, County of New York reveal that although Sol Klayminc did begin a defamation action against Bainton (by serving a summons and complaint in December 1982), that action was never pursued in any fashion and was eventually closed by the filing of a stipulation of

discontinuance in July 1984. The Court declines to find that the defamation suit would motivate the Special Prosecutor to engage in misconduct or that it did. See Prior Order, 592 F.Supp. at 746.

Likewise, the bankruptcy action in which Vuitton opposed the discharge of Sol Klayminc, did not create such a conflict of interest that would rise to the level of a due process violation. Simply because Vuitton's civil proceedings to recover damages and lost profits coincided with the criminal investigation does not require that the Special Prosecutor be disqualified. The taped conversations concerning the bankruptcy do not provide a basis for finding the "demonstrable level of outrageousness" of the sort discussed in Hampton v. United States, 425 U.S. 484, 495, n. 7, 96 S.Ct. 1646, 1653, n. 7, 48 L.Ed.2d 113 (1976) (Powell, J.

concurring). Even assuming that the taped conversations did concern subjects not relevant to the purpose of the undercover operation, as did much of Weinberg's conversational play acting, the standards for reversing a conviction or for dismissal of the charging instrument require much more offensive instances of prosecutorial misconduct than are alleged here. See Wright v. United States, 732 F.2d 1048, 1055-58 (2d Cir.1984).

The remaining arguments underlying defendants' due process claim involve subjects somewhat related to prosecutorial conflict of interest. These arguments concern the propriety of the government agents' conduct and whether the agents acted without proper governmental supervision. Defendants contend that the unsupervised nature of the investigation resulted in ambiguous

and unreliable evidence which was presented to the trier of fact.

One of the agents employed by the Special Prosecutor was Melvin Weinberg. Video and audio tapes of meetings and conversations between Weinberg and the various defendants formed the bulk of the government's evidence at trial. In his petition for a post-trial evidentiary hearing, defendant Barry Klayminc questions (1) the extent to which the government initiated rather than detected criminal activity; (2) the excessiveness of the sting; and (3) the lack of procedural safeguards in the investigative techniques. Barry Klayminc undoubtedly is correct when he states that: "But for the actions of Mel Weinberg, and those behind them, there would be no issue before the court today." The difficulty with defendant's position, however, is that he must

distinguish between inflitration by an undercover agent which constitutes "effective law enforcement work," United States v. Corcione, 592 F.2d 111, 115 (2d Cir.), cert. denied, 440 U.S. 985, 99 S.Ct. 1801, 60 L.Ed.2d 248 (1979), and governmental conduct which "creates a substantial risk that the 'guilty' verdict is not a reliable evaluation of what a defendant did." United States v. Myers, 527 F.Supp. 1206, 1229 (E.D.N.Y.1981), aff'd in part, 692 F.2d 823 (2d Cir.1982), cert. denied, 461 U.S. 961, 103 S.Ct. 2437, 77 L.Ed.2d 1322 (1983).

It is indisputable that Mel Weinberg is a "con man," that he has a prior criminal record, and that he used his amazing skills at role playing, deception and trickery during the course of these undercover operations. Weinberg's unsavory past and his skills afore-

mentioned do not disqualify him from employment as a government agent; in fact, they give Weinberg the ability to dissimulate and pretend convincingly, and to succeed at his role as an undercover informant or creator of a sting. Myers, 527 F.Supp. at 1239. The Court has reviewed trial transcripts as well as tape transcripts attached as exhibits to the parties' post-trial briefs and finds that none of Weinberg's conduct constitutes unconstitutional, outrageous government conduct of the sort that would justify setting aside a jury verdict on the ground that due process has been denied. Nor is Weinberg's crediblity or lack thereof a serious issue in the case. In truth, defendants were for the most part convicted out of their own mouths, not Weinberg's.

Although a small number of convictions have been overturned on due

process grounds relating to overinvolvement by government agents, United States v. Lard, 734 F.2d 1290 (8th Cir.1984); United States v. Twigg, 588 F.2d 373 (3d Cir.1978); Greene v. United States, 454 F.2d 783 (9th Cir.1971); United States v. Valdovinos-Valdovinas, No. CR-83-0711, slip op. (N.D.Cal. Feb. 15, 1984), rev'd on other grounds, 743 F.2d 1436 (9th Cir.1984), and although the Supreme Court has suggested that due process standards might bar convictions in a case of intolerable, outrageous government conduct, Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), far more frequently convictions have been upheld despite arguments from the defendants that their due process rights were violated by outrageous government conduct. See e.g.,

United States v. Myers, supra; United States v. Duggan, 743 F.2d 59 (2d Cir.1984); United States v. Dyman, 739 F.2d 762 (2d Cir.1984); United States v. Toner, 728 F.2d 115 (2d Cir.1984); United States v. Silvestri, 719 F.2d 577 (2d Cir.1983) (Abscam); United States v. Romano, 706 F.2d 370 (2d Cir.1983); United States v. Williams, 705 F.2d 603 (2d Cir.), cert.denied, ___ U.S. ___, 104 S.Ct. 524, 525, 78 L.Ed.2d 708 (1983) (Abscam); United States v. Carpentier, 689 F.2d 21 (2d Cir.1982), cert. denied, 459 U.S. 1108, 103 S.ct. 735, 74 L.Ed.2d 957 (1983) (Abscam); United States v. Alexandro, 675 F.2d 34 (2d Cir.), cert. denied, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982) (Abscam); Archer v. Commissioner of Correction of the State of New York, 646 F.2d 44 (2d Cir.), cert. denied, 454 U.S. 851, 102 S.Ct. 291, 70 L.Ed.2d 141 (1981); United States v.

Nunez-Rios, 622 F.2d 1093 (2d Cir.1980)United States v. Corcione, 592 F.2d 111 (2d Cir.), cert. denied, 440 U.S. 985, 99 S.Ct. 1801, 60 L.Ed.2d 248 (1979).

Whether the instant convictions must be overturned depends on the facts and the degree of outrageousness. In the case at bar, Weinberg did "string along" the defendants through the use of lies and false pretenses, money and similar encouragement. It is permissible for agents to infiltrate and participate in illegal enterprises for the purpose of obtaining evidence, United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), and the agents' conduct is not outrageous "merely because the agents did not cease their efforts immediately upon [defendant's] initial proclamation of honesty." Myers, 527 F.Supp. at 1231.

According to the dissent in Hampton, intolerable outrageousness, either on a due process or some other theory, would be reached where the "Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser . . ." of that contraband, thereby in effect creating the crime. 425 U.S. at 498, 96 S.Ct. at 1654 (Brennan, J., dissenting). The instant cased did not involve that sort of outrageousness. Weinberg did not supply counterfeits.

Furthermore, whatever claim of constitutional violation may have been founded upon Weinberg's statements that the Vuitton counterfeits to be made in the Republic of Haiti were not going to be sold in the United States and that it was not a crime to manufacture the Vuitton trademarked goods outside of the

territorial United States was cured by the Court's charge to the jury. As an abstract matter, the extra-territorial manufacture and distribution of the counterfeits by Sol Klayminc, or aiding and abetting him to do so, would violate the July 1982 injunction. See Steele v. Bulova Watch co., 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 252 (1952); Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932). However, in the interests of fairness, and because Weinberg, posing as Mel West, had told Sol Klayminc that such conduct would be legal, this Court instructed the jury that:

> "Before you may conclude that a defendant whose case you are considering undertook some act in violation of the injunction, you must find that in addition to satisfying its burden of proof as to the elements of contempt that I have already discussed, the government has also proved beyond a reasonable doubt that it was intended that

the offering or the manufacture, assembly, sale or other distribution of counterfeit handbags either did take place or was to take place wholly or partly in the United States. Much of the evidence presented in this trial has concerned activities that occurred or are alleged to have occurred in Haiti. I instruct you that the manufacture of counterfeit handbags in Haiti and the sale or distribution of those handbags in Haiti or Europe or anywhere else in the world entirely outside of the United States would not violate the injunction. So if you find that a plan or scheme for the manufacture and sale of counterfiet Vuitton bags existed but that those activities were to be conducted only outside the United States, with the sale or other distribution of counterfiet bags taking place only outside the United States, you may not find that any act in furtherance of that scheme violated this Court's order. Accordingly, any defendant who participated in a plan or scheme and did some activity in furtherance of it to sell or otherwise distribute or manufacture entirely outside the United States would not be in contempt of the injunction and such a person should be found not guilty.

However, if you find that it was understood and intended by the person whose case you are then considering that counterfeit handbags would be distributed or sold either wholly or partly in the United States and that the defendant whose case you are then considering undertook some overt act in furtherance of the plan to manufacture or distribute fake handbags in the United States, then you may find that that defendant violated the Court's injunctive order. In other words, members of the jury, in order to find a defendant guilty of contempt you must find beyond a reasonable doubt either that he participated in or aided and abetted a violation of the injunction here in the United States or in a scheme to manufacture or distribute counterfeit handbags made in Haiti to be sold, imported, distributed, either wholly or partly, within the United States." (Trial Transcript, pp. 962-64).

We believe that this instruction neutralized any prejudice suffered by any defendant who may have relied on the aforementioned advice on the part of Weinberg which we assume for the argument

may be characterized as outrageous. This instruction assured that the jury based its verdict upon reliable evidence of commission of the crime of contempt in the United States, and not in Haiti.

Finally, no matter what Melvin Weinberg did or did not say or do, he could not force Sol Klayminc to bring twenty-five counterfeit Vuitton bags to the Plaza Hotel in New York City, as he did, and exchange them for Six Hundred Twenty-five Dollars in cash, as he did. (Tape 6A, April 5, 1983). This was as clear an example of a criminal contempt as could be imagined.

In the same vein, the Court finds that the evidence received by the jury was not rendered unreliable due to any governmental misconduct. The defendants argue that the investigation produced ambiguous evidence, especially on the issue of intent, and that these

ambiguities by their very existence transgress due process limits. To the extent this argument addresses the weight or reliability of evidence, it presents a jury question. The jury viewed and heard taped meetings between Weinberg and defendants, some more than once. This does much to negate claims that the events and evidence were ambiguous. The video and audio tapes speak for themselves, and vividly. They are more reliable than testimony by any eye witness who attempts to recreate an event after it has occurred. Myers, 527 F.Supp. at 1229-30. During the taped conversations, it was permissible for the government's agent to simulate the guarded conversations that are generally expected in proposals by the minions of organized crime to engage others to assist in unlawful activites. Myers, 692 F.2d at 843-44. Furthermore, the issue

of intent always requires the jury to draw inferences and to make decisions about the meaning of a person's words and conduct. The strength of the overwhelming evidence in this case obviates any apprehension that the government's investigation created the risk that the jury verdicts were not based upon reliable fact-finding.

For example, Sol Klayninc's own statements form a basis for inferring that he knew that further counterfeiting would constitute a crime:

> SOL KLAYMINC: "Okay now, I need to protect myself against these people [Vuitton] because you know I had a to-do with them several times. I got to make sure that I don't expose myself to them again because it would be a criminal action." (Tape 6A, April 5, 1983).
>
> * * * * * *
>
> And he did it anyway:
> WEINBERG: "Order the LV's, just the LV's [Vuitton goods]. The hell with this other for a while. Let's get them out.
> SOL KLAYMINC: . . . All right. So now I spoke to this guy

> George and I gave him the order to start, three hundred satchels and a hundred shopping bags and a hundred cosmetic cases." (Tape 6B, April 5, 1983).

The operations of George [Cariste] were located in the United States and so known to be by Sol Klayminc at the time. Additionally, Sol Klayminc's own statements form an adequate basis to support the jury's finding that Sol Klayminc intended to distribute counterfeit Vuitton products within the territorial United States:

> WEINBERG: "How long do you think that the L.V.'s will still be popular in this country?
> SOL KLAYMINC: It could be good for another five years. . . .
>
> * * * * * *
>
> SOL KLAYMINC: Yeah, there's a big market out there, a tremendous market. (Tape 1, April 1, 1983).
>
> * * * * * *
>
> WEINBERG: We'll bring it in with our planes. There'll be no Customs or nothing.
> SOL KLAYMINC: Wow, that's great." (Tape 2, April 4, 1983).

Furthermore, the jury was entitled to believe Weinberg's trial testimony:

> (cross-examination by Mr. Weininger, Attorney for Sol Klayminc).
> "Q [Mr. Weininger]: And that had nothing to do with Klayminc's operation in Haiti?
> A [Mel Weinberg]: Sure it did. The bags are supposed to come into the states." (Trial Tr. p. 201).

The government introduced similar evidence of joint activity among the defendants. Without providing further examples of relevant evidence, a subject more fully discussed below in the Court's treatment of defendants' challenges to the sufficienty of the evidence, the Court finds that there was no impairment of accurate fact-finding, and that none of the challenged convictions should be set aside on the ground that defendants' constitutional rights were denied by reason of a faulty or poorly supervised government sting operation.

Turning to the motions for a post-trial evidentiary hearing, the Court concludes that this request also should be denied. The demand for a hearing is based upon the following theories and offers of proof: (1) that the 45 minute gap occurring on a tape recording of April 21, 1983 raises a strong inference of tampering by the government; (2) that the CBS Sixty Minutes program entitled "Sting Man Stings Again" and aired on October 21, 1984 provides new information concerning threats made by the government agent; (3) that defendant Nathan Helfand's testimony at such a hearing would establish that Weinberg was the one who initially asked Helfand whether he knew Sol Klayminc and that this testimony would establish improper targeting; and in general, (4) that defendants are in need of another opportunity to present evidence of outrageous government

conduct.

Even if such a hearing were held, and defendants were able to prove these contentions, the Court is unable to conclude that these specific events mentioned would violate constitutional due process standards.

According to a letter from James A. Cohen, attorney for Barry Klayminc, dated November 12, 1984, a due process hearing is necessary in order to give the Special Prosecutor an opportunity to explain the condition of the blank video tape which was introduced into evidence at trial . (Gov't. Ex. 109). The blank video tape was an attempted recording of an April 19, 1983 meeting at the Plaza Hotel attended by Barry Klayminc, George Cariste and Melvin Weinberg. As part of defendant Barry Klayminc's post-trial requests, granted by this Court at the hearing of October 5, 1984, Mr. Cohen

deposed the operator of the video equipment, Sgt. Michael Harvey, who is a California law enforcement officer. The Court has reviewed the typed transcript of this telephone conference call deposition. The transcript establishes that the technical supervisor, Sgt. Harvey, has no explanation for the failure of the recording device. From this fact, counsel for Barry Klayminc leaps to the conclusion that the Special Prosecutor must have tampered with the tapel while the tape was in his custody:

> "From our conversation with Mr. Harvey, it is clear that the problem did not occur at the time of the recording, since the tape has been (presumably) in the exclusive possession of the prosecutor or his agents; an inference that the agents/government tampered with the tape is irresistable. Since the inference raised is so strong, and since the due process concerns involving both the quality and method of the prosecution's investigation and the possible withholding of Brady material available on the

> tape are currently before the court, a hearing should be held to develop this issue i.e., the special prosecutor should be given an opportunity to explain the condition of the tape." (Letter of James A. Cohen, dated November 12, 1984).

It is unclear what evidence Mr. Cohen would expect to uncover at an evidentiary hearing on the subject of the blank video tape. The tape operator has already been deposed; the Special Prosecutor has already stated his position that the government knows of no explanation for the failure of the recording. (Hearing Transcript, October 5, 1984, p. 34; letter of J. Joseph Bainton, Esq., dated November 29, 1984). The trial jury was aware that the tape equipment had failed (Trial Tr., pp. 172-73, 465-71) and could have chosen to disbelieve Melvin Weinberg's uncorroborated account of the meeting. Finally, it is unclear how the tape could

have contained undisclosed Brady material since the defendant himself was present at the meeting which the government attempted to videotape. See United States v. Robinson, 560 F.2d 507, 518 (2d Cir.1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978).

Defendant Barry Klayminc has not referred to any unrecorded portions of the conversation with Weinberg that would have added to his defense. The tape equipment failure, in short, does not support an inference of due process violations on the part of the prosecution, and no hearing is necessary to elicit repetitious statements by the Special Prosecutor or Sgt. Harvey. These insinuations do not amount to sufficient evidence of tampering, to trigger a hearing. There is no duty to make recordings of criminal activity. United States v. Weisz, 718 F.2d 413, 435-37

(D.C.Cir.1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1285, 1305, 79 L.Ed.2d 688 (1984).

Turning to the alleged new information revealed during the Sixty Minutes television interview with Melvin Weinberg, defendants' due process theory here too fails to necessitate an additional evidentiary hearing. The so-called new information is not very new. It is the revelation that Weinberg made threats to Barry Klayminc during the course of the "sting" operation. On Sixty Minutes, Weinberg and Mike Wallace, host and interviewer, engaged in the following dialogue:

> "MR. WALLACE: Well, why did you make a death threat to Barry Klayminc?
> MR. WEINBERG: I made -- I didn't believe it was actually a death threat. I told him I'd break his head open if he keeps starting rumors.
> MR. WALLACE: You didn't say to him, 'You wouldn't want your parents to have only one child left?' -- and he had a sister.

> MR. WEINBERG: I may have said that to him there. I was trying to tell him to get off our back, 'cause he was going up telling the father we weren't for real.' (Transcript of CBS News, October 21, 1984, p. 11, annexed to Gov't Memorandum in Opposition, dated November 29, 1984).

At trial, Weinberg testified (Cross-examination by Mr. Cohen:

> Q: Did you ever say 'I will cut the cocksuckers throat, he will have a real scar?'
> A: If it is in the tape, I said it.
> * * * * * *
> Q: Did you ever say, 'Yeah, I got it out of the kid, and I said next time you open your fuckin' mouth is going to be the last time?'
> A: If it is on the tape, I said it." (Trial Tr. pp. 344-46).

Upon a comparison of Weinberg's post-trial statements to a CBS journalist, and the statements Weinberg made on tapes introduced at trial, as well as his cross-examination testimony quoted above, the Court cannot find that the more recently admitted threats are

different in degree or content from the threats exposed during trial. While the Court does not applaud the fact that undercover agents, if convincing, must "do and say things that are generally deplored in more civilized parts of our society," United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.), cert. denied, 445 U.S. 955, 100 S.Ct. 1608, 63 L.Ed.2d 791 (1980), the fact remains that an undercover agent often is playing the role of a hood, a criminal, a person with a reputation for violence and deceit. It is possible for a defendant to build a successful defense of entrapment or duress based upon such an agent's threatening and despicable conduct; however, the instant request is different, and not based on entrapment or duress. As is made clear by Mr. Cohen's letter dated December 10, 1984, defendant Barry Klayminc's motion is based upon the

theory that Weinberg's total conduct, including his "death threats," was so outrageous that the Court should find as a matter of law that the defendant suffered denial of his constitutional right to due process. This the Court declines to do.

Mr. Weinberg's "threats," considered separately or in context with his role as a self-proclaimed gangster, are not instances of actual coercion which left Barry or Sol Klayminc with no alternative but to continue participating in the criminal enterprise. Neither Weinberg's threats nor the Special Prosecutor's knowledge of Weinberg's tactics create the kind of government involvement that shocks our universal sense of justice, Kinsella v. United States, 361 U.S. 234, 246, 80 S.Ct. 297, 303, 4 L.Ed.2d 268 (1960), or the kind of conduct "so outrageous that due process principles

would absolutely bar the government from invoking judicial processes to obtain a conviction. . . ." United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973).

It is the Supreme Court's opinion in Russell and the separate opinions in Hampton that provide the foundation for defendants' due process theory for post-trial relief. Those opinions discussed the distinction between the due process claim and the entrapment claim, and, in Russell, the Court stated that the entrapment claim is not of constitutional dimension. 411 U.S. at 433, 93 S.Ct. at 1643. In view of the fact that the trial jury was instructed on the issue of entrapment (Trial Tr. pp. 967-71) and chose to convict the defendants despite their assertions, it would be error for the Court to permit the factual issue of entrapment to re-emerge following the

jury verdict, re-stated as a constitutional due process argument entitled to succeed as a matter of law. The jury has already considered the interactions among Weinberg and the various contemnors, and the possibility that the defendants had no previous intent to violate the law but were victims of entrapment. A successful post-trial due process challenge would have to be based upon facts other than those essential to the entrapment claim, already rejected by our jury, and none have been presented.

As to the proffered testimony by defendant Nathan Helfand, even if it were established that during Weinberg's fourth meeting with Mr. Helfand, Weinberg asked Helfand whether he knew Sol Klayminc and requested Helfand to contact Sol Klayminc (Joint Letter of James A. Cohen, Esq. and Thomas Matarazzo, Esq. dated November 28,

1984), this fact does not "clearly demonstrate that the Klaymincs were improperly targeted." (Id.)

The Myers district court addressed the issue of targeting in the Abscam "stings" and concluded that the prosecution needed no "probable cause" or even "reasonable suspicion" as a constitutional predicate to offering bribes to the defendant congressmen. 527 F.Supp. at 1226; accord, United States v. Myers, 635 F.2d 932, 940-41 (2d Cir.), cert. denied, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980); United States v. Jannotti, 673 F.2d 578, 609 (3d Cir.), cert. denied, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982). A fortiori, it can be no different for a handbag manufacturer with one prior conviction. The proffered testimony does not necessitate a due process hearing.

Sufficiency of the Evidence

Defendants Sol Klayminc, Barry Klayminc, George Cariste, Nathan Helfand and Gerald Young have moved for a judgement of acquittal pursuant to Rule 29(c), F.R.Crim.P. The memoranda in support of these motions focus upon different aspects of the evidence, but, in general, they assert that the government failed in its proof.

> "The standard to be applied by a trial court confronted with a motion for a judgment of acquittal was set forth in United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), quoting Curley v. United States, 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232 (D.C.Cir.), cert. denied, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947).
>
> > 'The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility,

> weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.
> (footnotes omitted).'

Furthermore, '[i]t is axiomatic on motion for acquittal that all reasonable inferences are to be resolved in favor of the prosecution and the trial court is required to view the evidence in the light most favorable to the Government with respect to each element of the offense.' United States v. Skinner, 138 U.S.App.D.C. 121, 123, 425 F.2d 552, 554 (D.C.Cir.1970)."

United States v. Artuso, 618 F.2d 192, 195 (2d Cir.1980), cert. denied, 449 U.S. 879, 101 S.Ct. 226, 66 L.Ed.2d 102 (1981). It is axiomatic furthermore that the trial judge cannot substitute his judgment for that of the jury, and is not "entitled to set aside the guilty verdict simply because he would have reached a different result if he had been the fact-finder." United States v. Cunningham, 723 F.2d 217, 232 (2d Cir.1983), cert. denied --- U.S. ---, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984).

Applying these principles to Sol Klayminc, his Rule 29 motion must be denied. It is indisputable that Sol Klayminc had knowledge of the 1982 injunction since he consented to its entry. It is indisputable that Sol Klayminc had awareness of the criminal nature of acts violating the 1982 injunction since he had already been

convicted of criminal contempt before Magistrate Bernikow of this Court. As to the requisite criminal intent, counsel for Sol Klayminc argues that Sol repeatedly expressed his desire to avoid any plans involving manufacture or distribution of Vuitton bags in the United States, and that these expressions negate the jury finding of guilty intent to violate the terms of the injunction. (Notice of Motion, dated August 3, 1984, pp. 4-14). In an effort to counter the evidence that Sol Klayminc sold 25 bags to Mel Weinberg at the Plaza Hotel in New York City, counsel for Sol Klayminc asks the Court "to view this exchange in the context of what the Prosecution knew about Mr. Klayminc's state of mind, that is his concern about not violating the Court Order." (Id. at 14).

The Court is certain that Sol Klayminc must have been "concerned" about

not violating the injunction. However, his "concern" changes neither what he said and did, nor the reasonable inferences to be drawn therefrom. The Court cannot find that "there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Taylor, supra.

The jury heard Sol Klayminc on audiotape exchange 25 counterfeit bags for cash within the territorial United States, evidence that was corroborated copiously by other recordings in which Sol Klayminc provided the jury with reasons to find that he intended that the counterfeits be offered for sale within the United States. Two samples are illustrative:

> "MR. MEL WEINBERG: All right? That these guys know they're dealing with me, to give us the material.

MR. SOL N. KLAYMINC: Oh yeah. Yeah.
MR. MEL WEINBERG: And then your son could stay in Haiti with you. I don't want you to come back to the States. You run your business. We'll take care of everything else here.
MR. SOL N. KLAYMINC: Okay, fine.
MR. MEL WEINBERG: We'll bring it in with our planes. We'll pick it up directly from him.
MR. SOL N. KLAYMINC: Beautiful.
MR. MEL WEINBERG: Bring it in with our planes. There'll be no Customs or nothing.
(Tape 2, April 4, 1983).

* * * * * *

MR. SOL KLAYMINC: Yeah, Okay, now what's happening with the L's [Louis Vuitton's] now. You -- we're going ahead with the 500. Now, I was speaking to Nat [Nathan Helfand], he said you wanted 2,500.
MR. MEL WEINBERG: No, no. I -- I got -- I need 5,000 L's.
MR. SOL KLAYMINC: L's?
MR. MEL WEINBERG: Yeah.
MR. SOL N. KLAYMINC: How long do you want to give me?
MR. MEL WEINBERG: Well . . .
MR. SOL N. KLAYMINC: You give me by the end of the month I'll get it for you.
MR. MEL WEINBERG: By the end of the month?
MR. SOL N. KLAYMINC: Well, it'll -- if you get half in the next couple of weeks, will that hold you off for awhile?

MR. MEL WEINBERG: Well, how many can George [Cariste] come up with?
MR. SOL N. KLAYMINC: I want George to cut for me and send it to Haiti. I could start making them there. He'll make half, I'll make half. Between the two of us we could knock you off the five [thousand] within a month.

* * * * * *

MR. SOL N. KLAYMINC: And then the fact that we send back legitimate stuff, I'll be making legitimate stuff, so that could go back in lieu. Now, we're going to send it through our name, my name.
MR. MEL WEINGERG: Right.
MR. SOL N. KLAYMINC: So now the other stuff I'll make and I'll send back and that'll be like, you know, the Customs I don't think they check what kind of stuff that you're sending.
MR. MEL WEINBERG: No, they don't check.
MR. SOL N. KLAYMINC: Right. So this way I send back legitimate goods and it covers the shipment."
(Tape 19, April 9, 1983).

These and other tape recordings, along with the trial testimony, amply support the jury verdict against Sol Klayminc. In addition, Governments Ex.

169, a written sales proposal by Helfand and Sol Klayminc to Mel West (Mel Weinberg's alias) contained reference to deliveries of fake Vuitton goods in New York or New Jersey. Sol Klayminc's actions -- selling the twenty-five bags at the Plaza Hotel, agreeing to manufacture fake Vuitton bags at his factory in Haiti for shipment to the United States, accepting money from Weinberg to purchase machinery, engaging in numerous meetings and conversations to further the manufacturing and distribution scheme, introducing Weinberg to Gerald Young in order to obtain counterfeit Vuitton-like fabric -- each of these acts could have supported the jury's conclusion that Sol Klayminc wilfully and intentionally disobeyed the 1982 court order by offering counterfeit Vuitton merchandise for sale in the United States.

The guilty verdicts against the four other contemnors also withstand their Rule 29 motions. Cariste, Helfand, Young and Barry Klayminc were tried and convicted on the theory that they knowingly and wilfully aided and abetted Sol Klayminc's commission of the substantive offense of criminal contempt. 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"). The elements necessary to prove aiding and abetting are "the commission of the underlying offense by someone, a voluntary act or omission, and a specific intent that such act or omission promote the success of the underlying criminal offense." United States v. Perry, 643 F.2d 38, 46 (2d Cir.), cert. denied, 454 U.S. 835, 102 S.Ct. 138, 70 L.Ed.2d 115 (1981).

The standard of proof as articulated by Judge Learned Hand, United States v. Peoni, 100 F.2d 401, 402 (2d Cir.1938), and currently applied in this Circuit, United States v. Clemente, 640 F.2d 1069, 1079 (2d Cir.1981), demands that a defendant must "in some sort associate himself with the venture . . . participate in it as something that he wishes to bring about, [and] seek by his action to make it succeed." As explained in United States v. Beck, 615 F.2d 441 (7th Cir.1980), the standard for aiding and abetting has two prongs -- association and participation; that is, intent plus some overt act designed to aid in the success of the venture.

In contending that the government's proof failed to satisfy these legal standards, defendant Nathan Helfand argues that there was inadequate evidence to establish that Helfand had knowledge

of the existence of the permanent injunction. Helfand need not have been served personally with a copy of the injunction in order to have had "knowledge" of what the order prohibited. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir.1979); Rule 65(d), F.R.Civ.P. (an injunction is binding upon those persons . . . "who receive actual notice of the order by personal service or otherwise") (emphasis added).

The evidence on this point included testimony by David Rochman that he received a telephone call from Helfand during the first week of April, 1983. Rochman testified that during this phone call, Helfand stated that he was involved with a large organization, together with Sol Klayminc who was "a very knowledgeable man in the business [counterfeiting], that he'd been doing

this kind of thing for many years, that he had some problems with the Vuitton people, had been sued a few times and was under an injunction now." (Trial Tr. 503-04). The jury also heard evidence that Helfand and Sol Klayminc had known one another for a long time. This is an adequate basis for the jury to conclude that Helfand acted with knowledge of the 1982 injunction. As for overt acts, it was Helfand who helped to arrange the April 5, 1983 meeting between Sol Klayminc and Melvin Weinberg at the Plaza Hotel. This act took place simultaneously with or immediately after Helfand's statement to Rochman that he knew about the injunction. Nor did Helfand drop out of the planning activities after the first week of April. Weinberg testified that "Helfand was calling me approximately every day" during the middle of April, 1983. (Trial

Tr. 117-18). There was sufficient evidence to prove that Helfand was not a passive bystander, but rather, an active participant in the substantive commission of knowing and wilful violation of the 1982 injunction.

Similarly, defendants George Cariste and Gerald Young voluntarily associated themselves with Sol Klayminc with the specific intent to aid in the success of the manufacturing and distribution scheme. Cariste himself supplied the twenty-five counterfeit bags to Sol Klayminc for the April 5, 1983 sale at the Plaza Hotel. Cariste testified at trial that he had no actual knowledge of the injunction at the time that he dealt in the counterfeits. Apparently the jury disbelieved him. That does not create grounds for a judgment of acquittal under the exacting standard of "no evidence upon which a reasonable mind might fairly

conclude guilt beyond a reasonable doubt."

The jury heard evidence that Cariste had known Sol Klayminc in 1982 when Karen Bags, Inc. went out of business and that Cariste obtained Sol Klayminc's dies used in manufacturing counterfeit Vuittons. The jury also heard David Rochman testify that Cariste told Rochman on April 12, 1983 that he knew about Sol Klayminc's "problems with an injunction." (Trial Tr. 507). During April, 1983, and after April 12, 1983, George Cariste committed several overt acts from which the jury could conclude that he specifically intended to promote the venture, including his attendance and participation at the meeting of April 19, 1983 at the Plaza Hotel with Barry Klayminc, Gunnar Askelund (a Vuitton undercover investigator) and Mel Weinberg. Cariste testified that before

this meeting he had delivered fifty counterfeit Vuitton bags to a location in New York City, knowing that the bags were for use in Sol Klayminc's Haitian factory. He also testified that he went to the April 19, 1983 meeting which was set up because "Mel" was looking for a manufacturer of fake Vuittons in the United States. (Trial Tr. 684-86). Clearly the jury could find that George Cariste had knowledge of the injunction and nevertheless chose to participate actively in the offer for sale of counterfeit Louis Vuitton products.

Contemnor Gerald Young was videotaped on April 14, 1983 at a meeting at the Beverly Wilshire Hotel in Los Angeles. On the videotape, received in evidence and played for the jury, Young promises Mel Weinberg that he will supply counterfeit Vuitton fabric. The fabric was to be produced in Japan and then

delivered in the United States via Young's contact in Hong Kong. The fabric would be in a roll having ten yards or so of "innocuous" fabric at its tail, so as to conceal the imitation Vuitton material. In addition, Young made arrangements to meet Gunnar Askelund at a California bank in order to open a joint account for funds to be used in obtaining the fabric. Young and Askelund signed bank signature cards for this purpose.

The jury fairly could have concluded that these and other overt acts were committed by Young while he had knowledge of the 1982 injunction. The government established, through credible evidence, that Young and Sol Klayminc had a longstanding relationship; and, again, Young's own statements revealed an awareness of the court order.

> "MR. GERALD YOUNG: I understand what you're saying.

> MR. MEL WEINBERG: This guy has got a million dollars worth of troubles.
> MR. GERALD YOUNG: Sol?
> MR. MEL WEINBERG: Yeah.
> MR. GERALD YOUNG: He got two million dollars worth. If he would have listened to me, he wouldn't have had those troubles.
> MR. MEL WEINBERG: Hey, second guessing --
> MR. GERALD YOUNG: Yeah. Hindsight is 20/20, right?
> MR. MEL WEINBERG: I mean the guy -- the guy got caught."
> (Tape 2, April 14, 1983).

Taken in view of the totality of the evidence, the jury could have found this and other statements to be a valid basis for inferring knowledge and wilfullness on the part of Young.

Because Barry Klayminc, like Sol Klayminc, consented to the entry of the 1982 injunction, there can be no doubt that he was aware of the prohibition against dealing in counterfeit Vuitton goods. It was stipulated at trial that knowledge is not a disputed issue in the case against Barry Klayminc. Instead,

this defendant bases his rule 29 motion largely on the argument that the evidence failed to prove a volitional, completed act by Barry Klayminc which would constitute criminal contempt. Defendant argues that Barry's role was limited to "discussions" about the bag scheme, and that Barry's statements either concerned past acts or were expressions of future intent. If this were true, the Court would find that the second prong of the test for aiding and abetting had not been satisfied and that the verdict could not stand because the jury could not have found the requisite participation by Barry. However, the facts in evidence support the jury's conclusion that Barry did more than just talk.

The most significant act by Barry Klayminc in furtherance of an intentional plan to offer counterfeit bags for sale in the United States was his attendance

at an April 19, 1983 meeting at the Plaza Hotel with Mel Weinberg and George Cariste. Cariste testified that Barry had telephone Cariste to arrange the meeting. (Trial Tr. 684-85). Barry met George Cariste in the lobby of Barry's apartment building and then escorted him to the hotel and called the room registered to "Mel West." After having several drinks in the hotel bar, Barry and Cariste went upstairs where Barry introduced Cariste to Weinberg. (Trial Tr. 169-73, 686-89). Later Barry telephoned Cariste to request that he cut patterns for the Vuitton dies. (Trial Tr. 692).

In addition the jury heard taped conversations between Barry and Weinberg. In one such conversation, Barry refers to a trip to New Jersey to make a "pick-up" from Cariste:

"MR. BARRY KLAYMINC: He also mentioned to me that, you know, when we want to make that pickup that I'll go along with your men or whatever, you know, with the --
MR. MEL WEINBERG: Oh, yeah, that's what I want to go over with you. All right.
MR. BARRY KLAYMINC: Yeah, no problem with that.
MR. MEL WEINBERG: All right, well, then we go to George's and make the pickup, all right?
MR. BARRY KLAYMINC: Right.
MR. MEL WEINBERG: He knows I would go with you. I'll send one of my drivers with the cash.
MR. BARRY KLAYMINC: Okay. No problem.
MR. MEL WEINBERG: Well, probably it's for your protection too.
MR. BARRY KLAYMINC: Right.
MR. MEL WEINBERG: All right? And then they'll take it and they'll go right to the plane. We'll have a plane at the airport.
MR. BARRY KLAYMINC: Fine. No problem.
MR. MEL WEINBERG: All right? Where? We got to go to Jersey?
MR. BARRY KLAYMINC: Yeah, yeah, he's out in Jersey. I don't have his address here. I'll get that from my father.
MR. MEL WEINBERG: Oh. I mean, is the place a safe place, though?
MR. BARRY KLAYMINC: What's that?

MR. MEL WEINBERG: Well, where they're going, is it a safe palce? To his house or factory, or what?
MR. BARRY KLAYMINC: I'm pretty sure, you know, it's a factory, but as far as I know' it's safe. I mean' there's never been any screw-ups before' so --
MR. MEL WEINBERG: All right --
MR. BARRY KLAYMINC: -- you know --
MR. MEL WEINBERG: -- that's all. I don't want to get you involved with it' you know.
MR. BARRY KLAYMINC: No, there won't be any trouble. I, mean, you know, this guy's, you know' he's a good man, and you know, there really won't be any problem." (Tape 30, April 12, 1983).

In another conversation, Barry discusses the possibility of manufacturing counterfeit Vuitton goods inside the territorial United States. It will be remembered that the "LV" mark is imprinted directly in the fabric itself, so that merely producing the material is itself an act of infringement.:

> "MR. MEL WEINBERG: We may be able to buy, we're working on a deal to buy a factory to produce our own material.

MR. BARRY KLAYMINC: Oh really?
MR. MEL WEINBERG: Yeah.
MR. BARRY KLAYMINC: That would be, that would be super.

* * * * * *

MR. MEL WEINBERG: So, we should be and we may buy another factory up in the, in the states.
MR. BARRY KLAYMINC: Right.
MR. MEL WEINBERG: And if we do, one of the things we're going to do is put you in to help run it.
MR. BARRY KLAYMINC: Okay, I, you mean to produce the product or just the fabric?
MR. MEL WEINBERG: No, no. We got, we'll have the fabric produced, all right?
MR. BARRY KLAYMINC: Right.
MR. MEL WEINBERG: And then to produce the product, we'll put you in 'cause you know the L.V.'s and all. Now, pop says George has got the dies for, of his?
MR. BARRY KLAYMINC: Yeah, he should have just about all the dies.
MR. MEL WEINBERG: But George has got 'em?
MR. BARRY KLAYMINC: Yeah."
(Tape 40, April 17, 1983).

In yet another taped dialogue, Barry Klayminc told Weinberg about his intimate familarity with counterfeiting business, and assured Weinberg that he could take

over for Sol Klayminc in the event that Sol became unable to manage the Haitian factory:

"MR. MEL WEINBERG: Any of the stuff for the Louis Vuitton there?
MR. BARRY KLAYMINC: What?
MR. MEL WEINBERG: Any of the stuff for the pocketbooks--?
MR. BARRY KLAYMINC: Well, the machinery, of course, will be used for that, but the leather is that softer leather, you know, we used, you know, for those other bags. But you know, the other machinery we definitely can use, you know, for the L. [Louise Vuitton] program.
MR. MEL WEINBERG: All right, now, long as I got you on the phone, all right--?
MR. BARRY KLAYMINC: Yeah.
MR. MEL WEINBERG: --your're going to be working for Pop, right?
MR. BARRY KLAYMINC: Yeah, sure.
MR. MEL WEINBERG: All right, what is your capacity? You know, we get to know each other.
MR. BARRY KLAYMINC: As far as what?
MR. MEL WEINBERG: Well, what did you do before for Pop?
MR. BARRY KLAYMINC: Oh well, like, everything from fixing machines to working with the biggest buyers, I mean, you

know, selling-wise. I mean, I ran the whole gamut. I started out, you know literally sweeping the floors, and you know, I was -- you know, supervised, worked on machines, fixed machines, went out selling -- you know, the whole deal. So there's no part of the business I don't know -- put it that way.
MR. MEL WEINBERG: Now, are you able to take over for us and make the L's [Louise Vuitton's] down in Haiti?
Mr. BARRY KLAYMINC: Oh, no problem.
MR. MEL WEINBERG: All right, and you know all about how to make 'em?
MR. BARRY KLAYMINC: Oh, yeah.
MR. MEL WEINBERG: And you did it up here?
MR. BARRY KLAYMINC: Oh, yeah.
MR. MEL WEINBERG: Oh, you did it up here, so you know about 'em.
MR. BARRY KLAYMINC: Yeah, no problem.
MR. MEL WEINBERG: All right, 'cause I didn't know that you did it up here or not.
MR. BARRY KLAYMINC: In fact, you know, comes out I'll look forward to doing the cutting and stuff on that, 'cause you know I used to get a little enjoyment out of, you know, getting the best, you know, out of it that you could, you know, the best yield, if you know what I'm saying, and oh yeah, you know, I mean, I'm

definitely fully versed on, you know, the whole operation and, you know, how everything goes.

* * * * * *

MR. MEL WEINBERG: --I'd like to meet you. But I mean, what I'm worried about is that anything happens to Pop, you know what to do, where to order, get the stuff, and--
MR. BARRY KLAYMINC: Right. Oh, no, no, I mean, you know, God forbid, of course, if that would ever happen, I mean, I'd fill right in, and I mean, I'd jump right in. I mean, I'm -- you know, you're not talking to a greenhorn here.
MR. MEL WEINBERG: All right, you know, I mean, the main thing is that you know how to make the L's [Louis Vuittons] that you did before.
MR. BARRY KLAYMINC: Yeah, definitely, definitely." (Tape 30, April 12, 1983).

Mindful of the requirement that the evidence be weighed as a whole rather than as individual facts in isolation, United States v. Wright, 588 F.2d 31, 34 (2d Cir.1978), cert. denied, 440 U.S. 917, 99 S.Ct. 1236, 59 L.Ed.2d 467 (1979), we believe that the jury reasonably could have found that Barry

Klayminc actively participated in an intentional plan to violate the court's injunction. Having established that Sol Klayminc specifically intended to distribute the counterfeits in the United States, the Special Prosecutor advanced proof that Barry Klayminc knowingly and wilfully committed acts to aid Sol Klayminc in the overall scheme to manufacture bags in Haiti for the purpose of selling them in the United States, Europe and elsewhere. Barry Klayminc was not merely present; he voluntarily attended incriminating meetings to which he brought another person, and he discussed specific, purposeful details concerning the logistics of the unlawful plan. These acts and discussions, viewed as a whole, are steps promoting the success of the venture, a venture in which Barry stood to make money. Accordingly, we cannot find that Barry's

role was passive or limited to ambiguous conversations. The jury was fully instructed as to the elements of aiding and abetting as well as to the meaning of specific intent. We assume that the jury followed these instructions, United States v. Hillard, 401 F.2d 1052, 1059 (2d Cir.), cert. denied, 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed.2d 1318 (1983), and that they properly found Barry Klayminc guilty of criminal contempt.

All of the defendants' motions are denied. The parties and counsel shall appear before this Court on March 1, 1985 at 2:00 P.M. for imposition of sentence.

So ordered.

UNITED STATES of America, ex rel. VUITTON ET FILS S.A., and Louis Vuitton S.A., Plaintiffs,

v.

KAREN BAGS, INC., Jade Handbag Co., Inc., Sol N. Klayminc and Jak Handbag Inc., Defendants and Alleged Criminal Contemnors,

and

Barry Dean Klayminc, Gerald J. Young, George Cariste, S.M.E., S.A., Crystal, S.A., David Rochman, Robert G. Pariseault, Esq. and Nathan Helfand, Additional Alleged Criminal Contemnors.

No. 83 Cr. Misc. 1, p. 22-CLB.

United States District Court, S.D. New York.

April 9, 1984.

J. Joseph Bainton, Robert P. Devlin, Specially Appointed Attys. (Reboul, MacMurray, Hewitt, Maynard & Kristol, New York City), for United States.

William P. Weininger, Samuel & Weininger, New York City, for defendant Sol Klayminc.

James A. Cohen, Washington Square Legal Services, Inc., New York City, for defendant Barry Klayminc.

Leonard Comden, Wasserman, Comden & Casselman, Encino, Cal., for defendant Gerald J. Young.

Mitchell B. Craner, Guazzo, Silagi, Craner & Perelson, P.C., New York City, for defendant George Cariste.

Charles J. Rogers, Jr., Providence, R.I., for defendant Robert G. Pariseault.

Thomas R. Matarazzo, Brooklyn, N.Y., for defendant Nathan Helfand.

Allen B. Bickart, Phoenix, Arix., for defendant David Rochman.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

Increasingly in recent years, amid considerable evidence that the production and distribution of counterfeit apparel, accessories and novelty gifts, ranging from "E.T." jewelry to "Grateful Dead" T-Shirts, has reached epic proportions, owners of trademarks and licenses in these items have fought back, bringing numerous suits to restrain the marketing of counterfeit goods. One of the more

active litigants in this respect has been Vuitton et Fils S.A., which is well known as a leading manufacturer of haute couture leather goods. In order to protect its trademark and profits from retailers of bogus handbags and related items, Vuitton has brought upwards of 80 suits in this Circuit alone. See Matter of Vuitton et Fils, S.A., 606 F.2d 1 (2d Cir.1979).

The criminal contempt proceedings challenged in this case arise out of one such effort by Vuitton -- a civil action commenced in December, 1978 entitled Vuitton et Fils, S.A. v. Karen Bags, Inc., et al., 78 Civ. 5863. In that action, the complainant sought injunctive relief and damages for trademark infringement and unfair competition allegedly committed by several defendants, including Sol Klayminc, Jade Handbag Co., Inc. ("Jade"), and Karen

Bags, Inc. ("Karen"). Shortly after the complaint was filed, the defendants consented to the entry of a preliminary injunction and further proceedings were stayed pending resolution in another court of the validity of the disputed trademark.

After determining, in July 1981, the alleged criminal contemnor Sol Klayminc, his wife Sylvia, and the family-owned companies Jade and Karen were continuing to sell counterfeit Vuitton products in violation of the injunction issued in December, 1978, Vuitton made an ex parte request for an order directing Klayminc and several others to show cause why they should not be cited for civil and criminal contempt. Vuitton also moved to have its own attorney, Joseph Bainton, appointed to prosecute the alleged criminal contempt on behalf of the United States. Both applications were granted

by Order dated July 8, 1981. The court subsequently directed that the criminal contempt be referred to a United States Magistrate for trial as a petty offense. At the conclusion of a trial held before Magistrate Leonard A. Bernikow, Sol Klayminc and the corporate defendants Jade and Karen were convicted of criminal contempt.

The underlying civil action was disposed of through a settlement agreement dated July 13, 1982 which provided that the aforementioned criminal contemnors, as well as Sylvia Klayminc, the Klayminc's son Barry, and another Klayminc company, Jak Handbag, Inc. would pay Vuitton $100,000.00 plus interest over a specified period. The Klaymincs and the affiliated firms agreed to the issuance of the permanent injunction sought in the complaint. The permanent injunction was entered by Judge Lowe of

this Court on July 30, 1982 and provided, in part, that the defendants refrain from producing, distributing or simulating goods in violation of Vuitton trademarks. Subsequently, the Magistrate, having been apprised of the terms of the civil settlement, sentenced Sol Klayminc to one year of probation for his criminal contempt conviction.

According to an affidavit filed in conjunction with the motion for the order to show cause which is at issue here, during the early part of 1983, Vuitton, along with the owners of certain other well known apparel and luggage trademarks, was contact by a Florida investigation firm and invited to participate in and pay for a "sting" operation. Essentially, the sting involved employees of the security firm posing as merchants interested in buying and selling counterfeit trademarked wares

on a large scale. Two of the operatives who undertook prominent roles in the subsequent operation of the sting were a former FBI agent, Gunnar Askeland, and Melvin Weinberg, who had also participated in the so-called "Abscam" operation of recent memory.

During the course of the investigation, alleged criminal contemnor Nathan Helfand, who had arranged for Weinberg and Askeland to purchase counterfeit trademarked goods, brought to their attention an individual named Sol (allegedly Sol Klayminc) who told Helfand that he had been "burned" by Vuitton "to the tune of $100,00," and that notwithstanding this undoubtedly unpleasant experience, he was still in the business of marketing counterfeit Vuitton wares.

Encouraged by Askeland and Weinberg, Helfand entered into further discussions

with "Sol" regarding the marketing of counterfeit Vuitton and Gucci wares. During the course of these discussions, Sol allegedly told Helfand that Vuitton products could be obtained from a man in New Jersey named "George." Based upon other information, Vuitton believed George to be alleged criminal contemnor George Cariste, who previously had evidently been identified to Vuitton as a primary supplier of counterfeit Vuitton merchandise.

In an affidavit sworn to on March 30, 1983, Mr. Bainton advised the Court in detail about the alleged instances of wrongdoing which its civil investigation had uncovered, and requested that he and another attorney, Robert P. Devlin, be specially appointed to represent the government in connection with the prosecution of the criminally contumacious conduct and "to continue the

investigation and, in due course, the prosecution of what appears to be a massive international conspiracy to violate this Court's permanent injunction." Bainton's application was accompanied by several exhibits which appeared to support his allegations against several of the accused. In addition, Bainton, correctly observing that an attorney specially appointed to represent the Government in a criminal contempt proceeding "stands in somewhat different shoes than a United States attorney," outlined some of the steps that he would take in further investigating and prosecuting the alleged contempt if his application was granted:

> On the assumption that this application would be granted, preliminary arrangements have been made for a meeting among Sol, Barry, Askeland, and Weinberg at the Plaza Hotel in New York City, at noon on Tuesday, April 5, 1983 . . . . In a technical fashion similar

> to that employed in the Abscam operation, the meeting among those individuals will be video-taped so that at some later time there can be no question as to what was said to whom and by whom. We expect that Sol will repeat the highly incriminatory statements he made last week at dinner with Helfand and on other occasions over the telephone to Helfand . . . . Sol has also been requested to bring to the meeting 25 of his better counterfeit Vuitton satchel purses . . . ."

Recognizing that it is generally deemed unethical for an attorney to participate in the surreptitious recordings of conversations, Bainton noted that he would not be similarly constrained if his application to be appointed special prosecutor were granted.

In an order dated the next day, Judge Lasker of this Court, finding that there was probably cause to believe that the named alleged criminal contemnors were "knowingly engaged in a course of conduct criminally contumacious of this

Court's final consent judgment and permanent injunction filed July 30, 1982," granted attorney Bainton's application to be appointed, along with Devlin, "in connection with the further investigation" of the alleged contempt and "the ultimate prosecution therefor." In addition, the Court specifically granted Bainton and Devlin permission to undertake the investigation which they had proposed in their application. Judge Lasker ordered that both Bainton's affidavit and the Court's own order of authorization be kept under seal.

Six days later, on April 6, 1983, Bainton and Devlin, acting pursuant to Judge Lasker's request[1] appeared before

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1. On March 30, 1983, in my absense from the district, Vuitton's Rule 42 application was made before Judge Lasker, who was sitting in Part I of the Court. Judge Lasker requested that Mr. Bainton bring to this Court's attention the fact that he had signed the March 31 order.

me to notify the assigned judge about the granting of Bainton's March 31st application. Bainton also advised the Court that their investigation had revealed that Klayminc and others had continued to deal with counterfeit Vuitton goods. The Court suggested that Mr. Bainton bring the investigation to the official attention of the United States Attorney's Office in this district, and that if requested, he comply with any requests for further information or cooperation which might be made by that office. Mr. Bainton agreed to do so and by letter dated April 6, 1983 made available the evidence which his investigation had uncovered to the Chief of the Criminal Division of the U.S. Attorney's Office for this district.

Once appointed to prosecute the alleged criminal contemnors, Mr. Bainton directed an investigation which produced

numerous video and audio recorded conversations among the alleged contemnors and members of the investigatory team. Based, in part, on the products of those recordings, Bainton requested and was granted, on April 29, 1983, an Order to Show Cause (for both civil and criminal contempt) against defendants Sol Klayminc, Barry Dean Klayminc, Gerald Young, David Rochman, Robert Pariseault, Nathan Helfand and George Cariste. The show cause order provided for the seizure of enumerated collections of counterfeit Vuitton goods, which had been indentified during the course of the investigation, as well as equipment, promotional literature and records related to the manufacture and distribution of counterfeit Vuitton products.

Numerous pre-trial motions have since been made by the defendants, and on

October 31, 1983, Bainton and attorneys representing each of the defendants appeared before the Court for oral argument. Post-argument briefs and letters were entertained by the Court, and the motions were fully submitted as of March 13, 1984. All of these motions will be addressed in this memorandum decision and where common legal issues are raised by two or more defendants, their motions will be considered together.

Motions to Revoke the Special Prosecutors' Appointment and Dismiss the Order to Show Cause.

The most significant challenge presented concerns the propriety of Judge Lasker's appointment of Mr. Bainton on March 31, 1983 as special prosecutor, and the nature and extent of his activities once invested with that authority.

The appointment of one of the attorneys in a civil action to prosecute a criminal contempt arising from a violation of the Court's orders in such an action is a long-standing practice the validity of which, in principle, is not subject to question. The most oft-quoted passage pertaining to this practice appears in a 1935 case arising in this circuit, McCann v. New York Stock Exchange, 80 F.2d 211, where Judge Learned Hand held:

> "Criminal prosecutions . . . are prosecuted either by the United States or by the court to assert its authority. The first are easily ascertainable; they will be openly prosecuted by the district attorney. In the second the Court may proceed sua sponte without the assistance of any attorney, as in the case of a disorder in the courtroom; there can be little doubt about the kind of proceeding when it is done. But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should . . . ." 80 F.2d at 214.

Our Court of Appeals has recently endorsed this time honored procedure in Musidor B.V. v. Great American Screen, 658 F.2d 60 (2d Cir.1981), cert. denied, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 656 (1982), where it rejected a due process challenge to a criminal contempt conviction secured by a special prosecutor appointed under circumstances very similar to those in this case. In Musidor, as in the instant proceeding, the Court had entered an injunction against dealing in counterfeit T-shirts displaying the trademarks of three rock music groups, and when it became evident that violations of the injunction had occurred, the district court, acting pursuant to Rule 42(b), F.R. Crim.P., appointed the plaintiff's attorney, who had obtained the original injunction, to prosecute the charges. Rejecting the defendants' challenges, after their

had obtained the original injunction, to prosecute the charges. Rejecting the defendants' challenges, after their conviction, to the validity of this procedure, the Court of Appeals quoted approvingly from the McCann decision, and observed that the Advisory Committee on Rules had relied upon McCann in establishing Rule 42 of the Federal Rules of Criminal Procedure.[2] Id. at 64.

The Court restated the rationale underlying the practice, and rejected the argument that criminal contempts invariably must be prosecuted by the United States Attorney:

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2. The McCann case is specifically cited in the Notes of the Advisory Committee to Rule 42, in conjunction with the Rule's requirement that the notice given to alleged contemnors describe criminal contempt as such in order to obviate the confusion experienced by the accused in McCann as to whether he was being proceeded against civilly or criminally.

> "Neither Rule 42 nor the Due Process Clause requires the court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation -- when the criminal contempt occurs outside the presence of the Court but in civil litigation -- require that the Court be permitted to appoint counsel for the opposing party to prosecute the contempt. There is no fund out of which to pay other counsel in such an event, nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available. In short, we follow the above quoted statement by Judge Hand in McCann." Id. at 65.

See also Universal City Studios v. Broadway Intern., 705 F.2d 94 (2d Cir.1983): "[T]he plain implication of the Rule is that the [contempt] proceedings are to be prosecuted either by the federal prosecutor or by a private attorney specifically designated to do so." Id. at 97. This practice has been endorsed and followed in other Circuits

as well. See e.g., Frank v. United States, 384 F.2d 276 (10th cir.1967), aff'd. on other grounds, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969); United States ex rel. Brown v. Lederer, 140 F.2d 136, 138 (7th Cir.1944), cert. denied, 322 U.S. 734, 64 S.Ct. 1047, 88 L.Ed.2d 1568 (1944); In re C.B.S., Inc., 570 F.Supp. 478 (E.D.La.1983).

Defendant Barry Klayminc, acknowledging that under McCann and Musidor, the appointment of private counsel is an acceptable, even "preferred" practice, urges this Court to distinguish or reject Musidor in light of decisions which have accorded defendants in criminal contempt cases procedural and constitutional protections enjoyed by other criminal defendants, discussed below. Even were this Court to disavow Musidor, defendants fail to demonstrate how the procedure provided for by Rule 42

is necessarily inconsistent with any of their due process rights.

In considering defendants due process challenge to the Rule 42 proceeding approved in this case, and the special prosecutors' actions once invested with that authority, we must keep in mind the still unique status of criminal contempt. While defendants are correct in asserting that we are a long way from the common law treatment of alleged contemnors, which permitted procedures otherwise prohibited in ordinary prosecutions for crime, criminal contempt continued to be characterized by procedures which distinguish it from ordinary statutory offenses. In this century, the Supreme Court has reduced this distinction to a great extent, having ruled, for example, that the standard of proof for criminal contempt is the same as that in any crimianl

action [Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911)]; that an alleged contemnor is entitled to assistance of counsel [Cooke v. United States, 267 U.S. 517, 45 S.Ct 390, 69 L.Ed. 767 (1925)]; and the right to a public trial before an unbiased judge [In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948)]. Most recently, in Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), the Supreme Court repudiated the longstanding exemption criminal contempts enjoyed from the constitutional requirements of a jury trial.

While it is certainly true that distinctions between contempt and other crimes have eroded, it is not the case, as defendants suggest, that in Bloom the Supreme Court swept away the last justification for according criminal contempt a special status. Before Bloom

it had been undisputed that contempt had been treated differently under federal law:

> "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government, proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers v. United States, 264 U.S. 95, 44 S.Ct. 272, 68 L.Ed. 577 (1925).

This distinction between statutory offenses and the Court's power to demand compliance with its mandates, United States v. Petito, 671 F.2d 68 (2d Cir.1982), cert. denied, 459 U.S. 824, 103 S.Ct. 56, 74 L.Ed.2d 60 (1982), has been the "doctrinal premise from which analysis of procedural safeguards has proceeded," United States v. Bukowski, 435 F.2d 1094, 1101 (7th cir. 1970), cert. denied, 401 U.S. 911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1971), and accordingly,

contempt proceedings have been evaluated by the due process standard of "fundamental fairness" rather than under the specific constitutional provisions governing state and federal statutory offenses. Id. at 1101. See also United States v. Martinez, 686 F.2d 334, 343-44 (5th Cir.1982): "criminal contempts have retained their unique status as quasi-criminal sanctions." Id. at 343. While Bloom left no doubt that contempt defendants are entitled to all fundamental procedural protections, courts since 1968 have rejected the suggestion that Bloom "signalled an abandonment of the doctrine that attributes 'special constitutional status' to contempt proceedings." United States v. Nunn, 622 F.2d 802, 803 (5th Cir.1980); Bukowski, supra, 435 F.2d at 1100. Nor is this Court precluded from continuing to weigh, in addressing

defendants' challenges to particular aspects of the instant contempt proceeding, the considerations of efficiency, cost and the public interest in vindicating the Court's authority which courts have cited in support of the special procedures provided for in Rule 42. Musidor, supra, 658 F.2d at 65; Universal City Studios, supra, 705 F.2d at 96; Nunn, supra, 622 F.2d at 804.

The procedure provided for in Rule 42 includes the appointment of an attorney of record to prosecute an alleged contempt. The fact that in general the appointment of the attorneys of record in the prior civil case was perfectly proper does not, of course, free us from the duty to address defendants challenges to the extent of the authority given those attorneys by Judge Lasker's order of appointment, or consider whether Mr. Bainton's

activities, once vested with special prosecutor status, have in some way violated defendants' due process rights.

Defendants contend that Judge Lasker's order of March 31, 1983 granted Vuitton's civil attorneys greater authority as prosecutors than was intended in enacting Rule 42, and suggest that the court has taken it upon itself to bestow upon private attorneys unsupervised and unlimited discretion to engage in all those investigatory and supervisory functions traditionally performed only by the office of the United States Attorney.

Defendants objections to the March 31st order center on their contention that this Court may authorize private attorneys under Rule 42 and Musidor to prosecute criminal contempts only when those contemps have "ripened," that is, at a time when it can be demonstrated

that a defendant or defendants have completed a violation of the terms of an injunction or other court order with actual knowledge of the Court's directive. Defendants argue that at the time the Court appointed Mr. Bainton and Mr. Devlin as special prosecutors, the acts of criminal contempt complained of (violation of the terms of the injunction pertaining to the Vuitton trademark infringement) had not yet occurred, and that by permitting the plaintiff's attorneys to undertake the type of investigation outlined in Bainton's affidavit submitted in support of Vuitton's motion for his appointment under Rule 42, the Court exceeded its authority.

There would appear to be some validity to the defendants' contention that the Court may not, under Rule 42, confer unlimited authority on a private

attorney to perform the full range of investigatory and prosecutorial duties performed by United States attorneys. E.g., United States ex rel. Vuitton et Fils S.A. v. McNally, 519 F.Supp. 185, 186 (E.D.N.Y.1981). It is clear, however, that in this case, contrary to the defendants' argument, Bainton and Devlin were not given authority to go out on a "hunting expedition" for the purpose of "ensnaring" subject parties "before any probable act of contempt had been committed." (Memorandum of Law of defendant Sol Klayminc). The Bainton affidavit alleged that several of the defendants in this action, as well as others unknown to the plaintiffs at that time, had, at the time of Vuitton's application, committed and completed acts of criminal contempt. These allegations, supported by circumstantial evidence apparent in the marketplace, were

considered sufficient by Judge Lasker to establish probably cause that a course of conduct had already commenced which was contumacious of the Court's orders in the litigation.[3] (See "Order Appointing

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3. Mr. Bainton's affidavit described in considerable detail the criminally contumacious enterprise which was alleged to exist, and identified several individuals who were said to play prominent roles in the distribution of counterfeit Vuitton wares. Much of the information allegedly was provided by defendant Helfand, who, after being introduced to Askeland and Weinberg, enabled them to make purchases of bogus items from middle level distributors and small manufacturers. Helfand also brought Sol Klayminc to the investigators' attention. They were informed that he was operating a factory in Haiti which produced counterfeit Vuitton goods. According to Bainton's affidavit, later discussions centered on possible investment by Askeland and Weinberg in the Haiti factory. Submitted with Bainton's affidavit was a memorandum purportedly written by Klayminc which described the operation of that enterprise and gave its production forecast. (See Ex. E. to Bainton Affidavit, March 30, 1983). At the meeting at which the Haiti operation was discussed, Helfand delivered several

[footnote continues on following page]

Counsel and Approving Certain Investigatory Measures," March 31, 1983). To this extent, then, the Court did authorize the plaintiff's attorneys to prosecute a "ripened" case of criminal contempt. It is true, however, that the Court's order went beyond merely authorizing Vuitton's attorneys to prosecute "ripened" acts of contempt, and granted them the authority to "further investigate" and "ultimately prosecute" the allegedly contumacious conduct, and,

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3. [continued from previous page]

counterfeit Vuitton items which were allegedly produced by Klayminc. Other individuals who are accused of having participated in the distribution of counterfeit Vuitton merchandise, including alleged contemnor George Cariste, were identified through Helfand. The allegations contained in the Bainton affidavit were sufficient, as Judge Lasker found, to support a finding of probable cause that a substantial criminally contumacious enterprise was in operation.

more specifically, to engage in the investigative techniques set forth in the Bainton Affidavit. It is the Court's authorization of additional investigation that the defendants object to most strenuously.

Defendants argue that in Musidor and indeed in all previous cases in which the Rule 42 procedure has been employed, the Special Prosecutor was not required to conduct an extensive investigation to establish the alleged acts of contempt which he sought to prosecute. Quite to the contrary, however, the evidence on which the convictions in Musidor were based was obtained through the services of a licensed private investigator, who at various times conducted surveillance on behalf of the plaintiffs, thereby establishing that the defendants were dealing in counterfeit T-shirts in violation of a prior injunction. 658

F.2d at 63. While it would appear that in Musidor, the investigation was conducted prior to the request for an order to prosecute under Rule 42, defendants have not explained why it should matter whether the investigation required to prove the existence of the ongoing criminal contempt is performed entirely prior to that request or is performed partially, as in this case, after that order is obtained, so long as the prosecutio proceeds in a proper fashion, and defendants' constitutional rights are fully protected.

Contrary to the defendants' assertions, the Court's order of March 31st did not constitute a "hunting [or fishing] license" with which Vuitton's attorneys could go out and indiscriminately "troll" for potential contemnors. Rather, having demonstrated probable cause that a course of conduct

criminally contumacious of this Court's earlier civil injunction was occurring, Vuitton's attorneys were given the authority to define more fully the boundaries of an already well developed contempt. The history of this and similar litigation shows that any action less encompassing than Bainton's attempts to discover the individuals violating a previous injunction will not suffice. In light of the apparent sophistication and resources of those who engage in mass violations of contempt orders in trademark infringement actions, a piecemeal approach, whereby the special prosecutor would have to find at least one act of fully "ripened" contempt before requesting permission to proceedd

against a particular individual, would prove unavailing.[4] This is not to say

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4. The agility and resourcefulness of wholesale and retail purveyors of counterfeit trademarked goods is as at one with the business acumen of cocaine dealers, as is demonstrated in Vuitton's previous attempts by litigation to quell distribution of cheap bogus merchandise which dilutes its valued mark. The Court of Appeals noted the difficulty attendant upon such cases of trademark infringement and unfair competition in Matter of Vuitton et Fils, S.A., 606 F.2d 1 (2d Cir.1979). In that case, the Court quoted with approval from an affidavit presented by Vuitton:

> "Vuitton's experience, based upon the . . . actions it has brought and the hundreds of other investigations it has made . . . has led to the conclusion that there exist variously closely-knit distribution networks of counterfeit Vuitton products.
>
> Vuitton's experience in several of the earliest cases also taught it that once one member of this community of counterfeiters learned that he had been identified by Vuitton and was about to be enjoined from continuing his illegal enterprise, he would

[footnote continues on following page]

that by allowing the prosecutor, as the March 31st order in this case does, to attempt to identify others unknown to him who are participating in an ongoing criminally contumacious course of conduct the Court authorizes him to do so through unlawful means. (See discussion of the actions of the Special Prosecutor, infra).

Defendants suggest that Bainton's activities in his role as "prosecutor" must be narrowly circumscribed under the

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4. [continued from previous page]

immediately transfer his inventory to another counterfeit seller, whose identity would be unknown to Vuitton." Id. at 2.

This modus operandi, which the Court of Appeals in Matter of Vuitton labeled the "persistent factual patterns in Vuitton's cases," id. at 3, n. 5, surely justifies Vuitton's approach in this case, which attempted to identify as many members as possible of a distribution network before seeking an order to show cause.

terms of the Rule, and restricted, essentially, to in-court prosecution of fully "ripened" contempts, or the presentation of a show cause order once a contempt has been committed. In support of this construction of Rule 42, defendants contend that nothing in the language of the Rule entitles specially appointed counsel to exercise the wider powers enjoyed by government prosecutors. Defendants fail to point to any cases in which the Rule has been construed in this limited fashion. Indeed, the meaning of the words "to prosecute" as used in Rule 42 has not been at issue in any of the prior cases dealing with this practice. In construing language used in legislation, it must be kept in mind that in the absence of legislative history to the contrary, or some other compelling reason, a Court must conclude that words were meant to have their normal or commonly accepted meaning:

> "As in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' Reiter v. Sonotone Corp., 442 U.S. 330, 337 [99 S.Ct. 2326, 2330, 60 L.Ed.2d 931] (1979), and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' Richards v. United States, 369 U.S. 1, 9 [82 S.Ct. 585, 590, 7 L.Ed.2d 492] (1962). Thus, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 [100 S.Ct. 2051, 2056, 64 L.Ed.2d 766] (1980)." American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982).

See also, United States v. Blasius, 397 F.2d 203 (2d Cir. 1968), cert. denied, 393 U.S. 1008, 89 S.Ct. 615, 21 L.Ed.2d 557 (1969); United States v. Rose, 549 F.Supp. 830 (S.D.N.Y.1982). Accordingly, it is clear that a special prosecutor's authority under Rule 42 extends beyond simply presenting evidence in court.

Limiting the extent of an appointed prosecutor's authority in the manner suggested by the defendants would have the effect of defeating the very interests which the procedure is designed to serve. Defendant Barry Klayminc, citing the Court of Appeals' assessment of the practical reasons underlying the Court's authority under rule 42 (see pp. 739-740, supra), states that the "logical sllution to the concerns expressed by the Court in Musidor is to refer all criminal contempt cases to the public prosecutor." (Defendant Klayminc's Reply Brief, p. 10). Realistically, however, for many reasons, aggrieved plaintiffs like Vuitton cannot depend on the United States Attorney's Office to enforce the court's mandates in civil cases of this nature.

The offices of the United States Attorneys throughout the nation are

already overburdened by those civil and criminal matters for which they have exclusive responsibility,[5] and while in particular cases it may be necessary for them to prosecute conduct criminally contumacious of a civil order, the special appointment procedure provided for in Rule 42 provides a fair and

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5. For example, on a national basis, the number of criminal cases filed in United States District Court has increased perceptibly in recent years, as the following statistics make clear:

UNITED STATES DISTRICT COURTS
Criminal Cases Filed During
Twelve Month Periods Ending in March

1980.....	28,458
1981.....	30,347
1982.....	31,942
1983.....	34,778

Expressed as a percentage, the number of criminal cases filed between March 31, 1982 and March 31, 1983 increased by 8.9%. Administrative Office of the United States Courts, Federal Judicial Workload Statistics (1983), p. 13. For the same period, the number of civil filings in which the federal government was a party rose from 70,585 to 89,512, an increase of 26.8%. Id. at 7.

efficient method of vindicating "the public interest in orderly government [which] demands respect for compliance with court mandates," United States v. Petito, 671 F.2d 68, 72 (2d Cir. 1981), and protecting the interests of civil plaintiffs like Vuitton.

The very scope of the allegedly contumacious enterprise in the instant case, which, according to affidavits and statements submitted by Vuitton's counsel, extends across the United States and beyond its borders, and involves many individuals and millions of dollars in counterfeit merchandise, illustrates the infeasibility of the defendants' contention that the United States Attorney must bear the sole burden of investigating and prosecuting such large and involved issues. The defendants would restrict the special prosecutor's authority to those contempts only which

have ripened fully, and would not permit the prosecutors to oversee any post-appointment investigation, as they did in this case. The impracticality of this approach and the effect it would have on plaintiff's ability to make use of the procedure provided for in Rule 42 have already been discussed.

Defendants also assert that the Court's earlier Order constitutes a violation of separation of powers principles in that the federal courts may not order the United States Attorney either to conduct an investigation of allegedly criminal activity or to prosecute a particular case, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir.1973); Cox v. United States, 342 F.2d 167 (5th Cir.), cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965). There are obvious

differences between a case involving a judicial attempt to supervise investigation and prosecution by the United States Attorney and the instant matter, where the appointment of special prosecutor was pursuant to a request made under Rule 42.

Because we find that Rule 42 confers sufficient authority upon the Court to authorize a special prosecutor to undertake the activities performed in this case, we need not determine whether, as Vuitton contends, the All Writs Act, 28 U.S.C. § 1651, similarly empowers the Court to approve these actions. We would observe, however, that insofar as the All Writs Act has been construed to permit a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdictions otherwise

obtained," United States v. New York Telephone Co., 434 U.S. 159, 172, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977), it also provides authority for the Court's order in this case.

Of course, as the Court has noted, the interests served by this procedure cannot take precedence over a defendant's due process rights. The Court will next address defendants' specific objections to the appointment made in this case, and to the special prosecutors' actions once appointed.

Defendants focus on the conflict of interest which is said inevitably to inhere in this setting. They observe, correctly, that the role of a public prosecutor is not exclusively, or even primarily, adversarial in nature, but exists to insure that "justice shall be done," Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314

(1935). Sensitive to the prosecutor's obligation to the defendant, the public and the criminal justice system, courts have not been hesitant to consider challenges to convictions obtained by government attorneys burdened with a real conflict of interest. E.g., Berger, supra; Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977).

Defendants allege that Mr. Bainton possesses several personal interests which might cause his actions in prosecuting this matter to be governed by something other than his obligation to see that justice be done. The Klaymincs seek to disqualify him from further involvement in this prosecution on the ground that he has two pecuniary reasons for winning contempt convictions. The first is said to derive from the fact

that because Vuitton had bankrolled his prosecutorial efforts, Bainton will be expected to win convictions for his client and if he does not, Vuitton will take its future substantial legal business elsewhere. Therefore, it is argued, it is unlikely that he would drop charges which ultimately prove unsupportable, or which the "interest of justice" might require be disposed of by negotiated plea. If the Court were to accept this reasoning as grounds for disqualifying counsel in the instant case, it would have to do so in every other trademark case in which a civil plaintiff seeks to have an injunction enforced against a particular defendant, since counsel in all of these cases are compensated by civil clients. This consideration cannot have escaped the notice of courts which have approved the appointment of privately retained counsel

as special prosecutors in previous cases. In Musidor, for example, a similar allegation was made concerning the prosecutor appointed by the court. The defendants suggested that, because the injunctions violated in Musidor were issued in civil actions in which substantial damages were sought, the prosecutor's financial interest in the outcome of the pending civil litigation was an inducement for him to behave unfairly in the trial of the contempt charges so as to obtain an advantage in the civil case. The court refused, on this basis, to overturn the contempt convictions secured by him. 658 F.2d at 64.

Defendants allege, as a second pecuniary motivation, the fact that Mr. Bainton and his law firm are defendants in a defamation action brought in the New York State courts by Sol Klayminc. This

lawsuit, the existence of which was revealed to the Court in Bainton's application for apppointment of counsel, was commenced in 1982, after Klayminc's federal conviction for contempt of a Court order prohibiting him from dealing in counterfeit Vuitton wares. It has never been brought to trial. In his complaint in the state court defamation action, Klayminc alleges that Mr. Bainton made derogatory remarks about him during the course of the prior federal action. Details of his state case, which although almost two (2) years old, apparently has not progressed substantially beyond the complaint stage, were explored by the Court during the October 31, 1983 hearing (Tr. 6, 7, 48-50).

Mr. Bainton personally is protected from any financial loss by his firm's liability insurance, and in any event the Court declines to find that Mr. Bainton

would be so motivated by the outcome of the defamation case that he will attempt to obtain unjust criminal convictions of the Klaymincs in order to improve his position in the state defamation action. Indeed, since the civil case has never been placed on a trial calendar or brought to trial, although pending since 1982, an inference follows that it is a frivolous lawsuit interposed solely to impede Vuitton in protecting its mark.[6]

In making these and other arguments, the defendants overlook the commitment of this Court that throughout these

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6. By a letter filed after the October 31, 1983 hearing had closed, defendant Sol Klayminc raises an additional argument with respect to the conflict of interest claim. He asserts that having filed a petition in bankruptcy, Vuitton, represented by Mr. Bainton's lawfirm, has filed a complaint to determine non-dischargeability. This post-hearing contention is not regarded as sufficient to require disqualification.

proceedings they will be afforded all procedural protections due them. The Court's approval of Vuitton's application in this case does not give the special prosecutors any letters of marque or reprisal against the defendants. This Court will continue to entertain all substantive objections to the manner in which the prosecution is conducted, and will assure that defendants are accorded all the protections given to other criminal defendants.

Defendant Klayminc argues, for example, that a possible source of prejudice to the defendants is that any exculpatory Brady or § 3500 material Mr. Bainton may possess may have come to him within the confines of the Vuitton/Bainton attorney-client privilege. The Court addressed this point during the hearing and has ruled explicitly that Vuitton must release all

such material. The Court stressed that the plaintiff has, by authorizing Bainton's efforts and presumably, paying for them, waived any such privilege it might otherwise enjoy. (Tr. 12-13).

Defendants also challenge the propriety of the eavesdropping which was conducted in California following the issuance of Judge Lasker's order Approving Counsel and Approving Certain Investigatory Measures. Defendants note that several provisions of the California Penal code appear to prohibit the surreptitious recording of confidential communications by any "person," defined as including government officials, whether state, local or federal.[7] Under

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7. The relevant portions of the California Penal Code provide:

"§ 631

(a) Prohibited acts; punishment; recidivists

[footnote continues on following page]

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7. [continued from previous page]

(a) Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection . . . with any telegraph or telephone wire, line, cable, or instrument, . . . or who willfully and without the consent of all parties to the communications, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit . . . is punishable by fine . . . or by imprisonment . . . .

* * * * * *

(c) Evidence

(c) Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

§ 632 Eavesdropping on or recording confidential communications

(a) Prohibited acts; punishment; recidivists

(a) Every person who, intentionally and without the consent of all parties to a conficential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communications

[footnote continues on following page]

7. [continued from previous page]

> . . . shall be punishable by fine . . . or by imprisonment.
> * * *(b) Person
> (b) The term 'person' includes an individual, business association, partnership, coroporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication.
> * * * * * *
> (d) Evidence
> (d) Except as proof of an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.
> * * * * * *
> § 633 Law enforcement officers; authorized use of electronic, etc., equipment
> Nothing in Section 631 or 632 shall be construed as prohibiting the Attorney

[footnote continues on following page]

the terms of the California Penal Code, however, state and local attorneys and law enforcement officials are authorized to record conversations in exercising their official duties.

On April 6, 1983, one week after obtaining the appointment and order from

7. [continued from previous page]

> General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, or any officer of the California Highway Patrol, or any chief of police, assistant chief of police, or policeman of a city or city and county, or any sheriff, under sheriff, or deputy sheriff regularly employed and paid as such of a county, or any person acting pursuant to the direction of one of the above-named law enforcment officers acting within the scope of his authority, from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter." West's Ann. Cal. Pen. Code, §§ 631-633.

Judge Lasker, Mr. Bainton informed the Court that he had recorded several telephone conversations in New York City. Shortly thereafter, on April 13th, Mr. Bainton wrote to Head Deputy District Attorney Kildeback of Los Angeles, to whom he had spoken the day before, informing him of his appointment as special prosecutor. Noting that the Penal Code seemed to prohibit him, as a federal official, from supervising eavesdropping in California, Mr. Bainton agreed to Mr. Kildeback's request that so much of the investigation that was being conducted in California be done at the direction of the latter's office. (Tr. 234-35). The undercover investigation subsequently completed yielded over 70 tape recordings and several videotapes, all made in California, which were cited in requesting the show cause order on April 29th.

Defendant's contentions that Mr. Bainton behaved improperly in "supervising" the California wiretaps is without merit. Even if Mr. Bainton's actions were not supervised in turn by the Los Angeles District Attorney, as they appear to have been, any construction of the California Penal Code which would prevent a duly appointed federal prosecutor from making tapes which are valid and admissible under federal law would be, as the Ninth Circuit has held in United States v. Kerrigan, 514 F.2d 35, 37, n. 5 (9th Cir.1975), "wholly unsupportable." This is because constitutional activities of the federal government are immune from state regulation in the absence of clear Congressional authorization of a particular state regulation. Hancock v. Train, 426 U.S. 167, 179, 96 S.Ct. 2006, 2012, 48 L.Ed.2d 555 (1976); Perez v.

Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).

While immunity from such state regulation extends to individual federal government agents in the performance of their duties, United States v. City of Pittsburg, Cal., 661 F.2d 783, 785 (9th Cir.1981), defendants contend that Mr. Bainton does not enjoy such immunity because, since he is compensated by a private party, he cannot be elevated to the status of a federal employee. The Court rejects this argument. Once appointed a special proescutor for purposes of this action, Mr. Bainton is protected by the same official immunity that federal officials enjoy in carrying out their duties, regardless of the source of his compensation.

Defendant Barry Klayminc asserts that an additional reason to dismiss the show cause order stems from the special

prosecutor's failure to initiate the proceedings by indictment. This argument need not detain us. As the Court has discussed above, criminal contempt proceedings occupy a unique position. One aspect of contempt which separates it from other criminal offenses is the provision, in Rule 42, for the initiation of proceedings by notice, rather than by indictment or information. Defendants contend that the Supreme Court's decision in Bloom, holding that jury trials must be provided in serious contempt cases, overruled, sub silentio, its previous decision in Green v. United States, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958). This argument has been made many times before, but until now the federal courts have refused to require that criminal contempts proceed by way of indictment. E.g., Martinez, supra, 686 F.2d at 343; Nunn, supra, 622 F.2d at

804; United States v. Marthaler, 571 F.2e 1104 (9th Cir.1978); Eichhorst, 544 F.2d 1383, 1386 (7th Cir.1976). Defendants' attempt to distinguish these cases because the contempt proceedings in this case were initiated by a specially appointed prosecutor, rather than by a U.S. Attorney, does not persuade the Court that a departure from this authority is warranted.

In conclusion, the Court declines as a matter of discretion to grant the defendants' request to dismiss the order to show cause and revoke the special prosecutors' appointment.

Specificity

Defendants Rochman, Young, Cariste and Helfand move to dismiss the order to show cause based on what they claim to be its failure to apprise them adequately of the charge against them, and to allege, with specificity, that they had actual

knowledge of the injunction they violated. Defendants argue, correctly, that as non-parties to the injunction issued on July 30, 1982, they may not be found guilty of criminal contempt thereof absent proof that at the time they allegedly acted in violation of the injunction, they had actual knowledge of its existence. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir. 1979); United States v. Baker, 641 F.2d 1311, 1315 (9th Cir. 1981). Reasoning that since this knowledge is an essential element of the crime with which they are charged, they argue that the show cause order should be dismissed, because it contains no evidentiary showing that they possessed the requisite mental state.

Rule 42(b) "requires criminal contempt to be prosecuted on notice stating the essential facts constituting

the contempt charge," United States v. United Mineworkers of America, 330 U.S. 258, 296, 67 S.Ct. 677, 697, 91 L.Ed. 884 (1947). As this Court has held herein, Rule 42(b) does not require that contempt proceedings be initiated by a grand jury indictment, and accordingly, the particularity and technical accuracy of an indictment is not required in a prosecution on notice case of this type:

> "Instead, all that is required is that the [defendants] have been 'fairly and completely apprised of the events and conduct constituting the contempt charged.' This is to be judged with reference to all of the court papers served on appellants in light of what transpired in the Court proceedings." United States v. Eichhorst, 544 F.2d 1383, 1386 (7th Cir.1976); see also United States v. Martinez, supra, 686 F.2d at 345.

Judged by this standard, the notice provided to these defendants in the show cause order provided sufficient information to inform them of the nature

and particulars of the contempt charge. The show cause order alleges with respect to each defendant that he is charged with criminal contempt, enumerates the specific role he is alleged to have performed in the production and distribution of counterfeit Vuitton items, and alleges that he had actual knowledge of the terms of the injunction. For example, with regard to defendant Helfand, the show cause order states at p. 6 that:

> "(a) In or about March, 1983, helfand purchased 'samples' of counterfeit Louis Vuitton merchandise from Klayminc, Sr., to show Weinberg:
> (b) On or about April 1, 1983, Helfand introduced Weinberg to Klayminc, Sr., for the purpose of facilitating Klayminc, Sr.'s sale to Weinberg of substantial quantities of counterfeit Louis Vuitton merchandise;
> (c) During March and April 1983, Helfand aided and abetted Klayminc, Sr., in convincing Weinberg to agree to invest in Klayminc, Sr. and Klayminc, Jr.'s Haitian Louis Vuitton Counterfeiting operation.

Helfand engaged in each of the foregoing acts with others with actual knowlege of the injunction and in wanton disregard thereof."

The Court finds that the allegations against each of the defendants "satisfies due process by 'containing enough to inform [them] of the contempt charged.'" Martinez, supra, 686 F.2d at 345, quoting United States v. Robinson, 449 F.2d 925, (9th Cir.1971).

Concerning the defendants' complaint that the show cause order does not make a sufficient factual showing that they had actual knowledge of the 1982 injunction, the Court notes that in light of the limited nature of the notice required under Rule 42, Vuitton was not required to allege evidentiary facts supporting every element of the crime charged. Cf., United States v. Eichhorst, supra, 544 F.2d at 1385, 1386.

At trial, the Government will be required to prove beyond reasonable doubt as to each defendant, actual knowledge of the prior injunction. It is not required, however, to alleged knowledge with great specificity at this stage of the proceedings.

Even if the defendants' argument that the Government must demonstrate probable cause that the defendants had such knowledge were accepted, the Court believes that the order to show cause, when read in conjunction with the Bainton Affidavits of March 30th and April 29th, and documents submitted therewith, does present substantial evidence that the defendants were aware of the Consent Order and Injunction issued in July 1982.

It is also suggested that the Government should be required to allege facts sufficient to establish probable cause to believe that the acts of

contempt alleged actually occurred. While a Court may in its discretion require such a showing in a contempt proceedings, In re United Corporation, 166 F.Supp. 343 (D.Del.1958), this is not mandatory and the pleadings in support of the issuance of the show cause order may rest solely upon information and belief. United States v. United Mineworkers, supra, 330 U.S. at 296, 67 S.Ct. at 697; Wright & Miller, Federal Practice and Procedure (Criminal) § 710.

Motions for a Separate Trial

Defendants Rochman, Young and Pariseault move, pursuant to Rule 14 of the Rules of Criminal Procedure, for a trial severence. In addition, Rochman moves under Rule 21(b) for a change of venue.

Rule 21(b) provides that: "for the convenience of parties and witnesses, and

in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him . . . to another district." A motion for achange of venue is addressed to the sound discretion of the trial judge, United States v. Garber, 413 F.2d 282 (2d Cir.1969), and in determining the propriety of a transfer request, he is to be guided, in general, by the criteria set forth in Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964). The factors to be considered in addressing Rochman's motion are: location of the defendant, counsel, potential witnesses, and documents and records likely to be in issue; disruption of the defendant's business; expense to the parties; relative accessibility of the place of trial; and the docket condition of each district involved. Id. In support of his motion to trnafer his case

to Arizona, Rochman alleges that he resides in Arizona, that his witnesses all reside in or near Phoenix, Arizona, or Los Angeles, California, that the events in his case occurred in the far West, that New York is not easily accessible for him, his witnesses, and his attorney, who also resides in Arizona. In conjunction with his argument that his witnesses will be severely inconvenienced by a trial in this District, Rochman focuses in particular on the large expense he will incur if forced to transport them to New York.

While it is undoubtedly true that he would find it more convenient to be tried in Arizona and several factors favor such a transfer, the Court finds that defendant has failed to meet his burden of establishing either that a substantial balance of inconveniences is in his

favor, or that the interests of justice require a transfer. United States v. Wheaton, 463 F.Supp. 1073, 1079 (S.D.N.Y.1979); United States v. Williams, 437 F.Supp. 1047, 1051 (W.D.N.Y.1977). Rochman has failed to support, with requisite specificity, his claim that his witnesses will be inconvenienced by trial in this district. Simple assertions that witnesses will be burdened by trial in a distant forum will not suffice:

> "[T]ransfer motions must identify inconvenienced witnesses whom defendants propose to call and contain a 'showing' of the proposed witnesses' testimony. Defendants must offer specific examples of witnesses' testimony and their inability to testify because of the location of the trial. In short, in order to make an informed decision regarding the necessity of those defense witnesses who would be inconvenienced or unable to attend trial absent transfer, the court must rely on 'concrete demonstrations' of

the proposed testimony." United States v. Haley, 504 F.Supp. 1124, 1126 (E.D.Pa.1981) and cases therein cited (footnotes omitted); United States v. Aronoff, 463 F.Supp. 454, 460 (S.D.N.Y. 1978).

While in an affidavit accompanying his motion to transfer, Rochman does name each of the seventeen witnesses he proposes to summon in his behalf, Rochman fails to allege what the substance of their testimony will be, nor does he cite specific examples of their testimony, beyond the most vague identification of each witness as an "activities," "records," or "character" witness. We are not informed what "activities" or "records" these witnesses would testify about, or how this testimony would relate to the offense with which he is charged, or why the records, or for that matter, the activities, could not be the subject of a stipulation. Accordingly, movant

has failed to present an adequate basis to support his contentions concerning the defense witnesses.

While defendant is able to demonstrate that trial in this district would interrupt his employment, the Court is not persuaded that he would, as he claims, lose his job. Although he maintains that he has "neither relatives or business associates who could assist him in maintaining his job responsibilities with Host National," evidently this may not be the case since his employer is his partner and brother-in-law.

The docket condition of this district as opposed to that of the district of Arizona does not, as Rochman maintains, argue in favor of a transfer here. This court is current with its criminal calendar, and in any event, the applicable Speedy Trial Act requirements

have preempted this Platt factor.

Other factors militate against directing a transfer in this case. As the special prosecutor has noted, it is not alleged, as Rochman suggests, that all of his conduct which is alleged to be contumacious occured in Arizona or California. Evidently the Government's proof will attempt to show that Rochman also met the undercover agents in New York, and then accompanied them elsewhere to factories at which counterfeit Vuitton goods allegedly were produced.

If Rochman's case is transferred, the cases of the non-moving defendants will still be tried in New York. In assessing the balance of inconveniences, this Court is entitled to weigh the duplication of effort and court time, as well as additional expense that would be incurred by such a partial transfer. United States v. Wheaton, supra, 463

F.Supp. at 1079. The Court does not find that defendant's allegations with respect to the other Platt criteria, when considered collectively and weighed against the inconvenience of a transfer, are sufficient to justify a change of venue under Rule 21(b) and, accordingly, the defendant's motion is denied.

In addition to his transfer request, Rochman moves for a severance pursuant to Rule 14, which provides:

> "If it appears that a defendant or the Government is prejudiced by a joinder . . . of defendants . . . for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires."

Defendants Young and Pariseault also request separate trials.

A defendant seeking a severance bears a "heavy burden" of demonstrating that he will suffer "substantial prejudice," from a joint trial, United

States v. Carson, 702 F.2d 351, 366 (2d Cir.), cert. denied sub nom. Mont v. United States, ___ U.S. ___, 103 S.Ct. 2456, 77 L.Ed.2d 1335 (1983):

> "Substantial prejudice does not mean merely a better chance of acquittal. The prejudice must be of such a degree that the defendant's rights cannot be 'adequately protected by appropriate admonitory instruction to the jury,' and 'such that, without a severance,' he would 'not receive a fair trial.' Absent such a showing the defendant's request for a separate trial must give way to the public interest in avoiding unnecessary duplicative efforts, trial time and expense." (Citations omitted). United States v. Potamitis, 564 F.Supp. 1484, 1486 (S.D.N.Y.1983).

Defendant Rochman bases his request for severance on the fact that he is joined with defendants who previously have been involved in Vuitton contempt litigation. Noting that he was not a party to the injunction whose terms he has allegedly violated, has never been

involved with any prior trademark litigation, and has only been involved in the "industry" recently, Rochman argues that there is a significant risk that evidence pertaining to the more culpable defendants will "rub off" on him. This argument, commonly referred to as the "spillover" effect, has been made on numerous occasions, most recently in Carson, supra, where a defendant asserted that the disproportionate nature ofthe charges against him, vis-a-vis his co-defendants, and proof that the heroin conspiracy was a "family business" in which his co-defendants had been long involved, causes substantial prejudice to him. Like Rochman, the defendant in Carson alleged that the substantial evidence amassed against one defendant will necessarily spill over into the jury's consideration of his less culpable co-defendant. Condeding that there was

"no question" that the defendant" had played a lesser role in the conspiracy, the Court of Appeals rejected the appeal from denial of severance: "[D]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." Id. at 366-67; see also United States v. Aloi, 511 F.2d 585, 598 (2d Cir.), cert. denied, 423 U.S. 1015, 96 S.Ct. 447, 46 L.Ed.2d 386 (1975); Potamitis, supra, 564 F.Supp. at 1486.

Rochman's contention constitutes "no more than the usual claim that [he] might fare better if severed," which is insufficient, without more, to justify severance. United States v. Stirling, 571 F.2d 708, 733 (2d Cir.), cert. denied, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978). We are persuaded that the Government's case against

Rochman, which is described as consisting mostly of recordings, will be "straightforward enough for the jury to consider without any significant spillover effect," United States v. Losada, 674 F.2d 167, 171 (2d Cir. 1982), cert. denied, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982). Moreover, limiting instructions as to the use of evidence against each defendant will be sufficient to overcome any prejudice.

Rochman suggests that because several of hsi co-defendants have been defendants in prior criminal and civil contempt proceedings, evidence of their prior involvement in counterfeiting activities presumably will be presented at trial, and will have a prejudicial effect on his case. In making this argument, defendant overlooks the fact that at trial the Court will instruct the jury to accord each defendant separate

consideration, and to refrain from weighing evidence admissible against one defendant against another. Carson, supra, 702 F.2d at 367; United States v. Rosenwasser, 550 F.2d 806 (2d Cir.), cert. denied, 434 U.S. 825, 98 S.Ct. 73, 54 L.Ed.2d 83 (1977).

Rochman also contends that as in Bruton v. United States, 391 U.S. 123, 88 S.Ct 1620, 20 L.Ed2d 476 (1968), a severance is required here because the prosecution intends to use the inculpatory statements of co-defendants against him, depriving him of his right to confront the witnesses against him. This point need not detain us. Assuming that Rochman's prediction about the Government's strategy comes to pass, this argument is premature since Bruton would apply only if one or more of his co-defendants elected not to take the stand at trial, and we cannot know, at this

stage, whether this will occur. United States v. Holman, 490 F.Supp. 755, 764-55 (S.D.N.Y.1980); United States v. Olin Corp., 465 F.Supp. 1120, 1130 (W.D.N.Y.1979). Furthermore, Bruton does not apply to a co-defendant's extra-judicial admission which may be received in evidence under Rule 801(d)(2)(D) or (E), F.R.Evid. Accordingly, Rochman's motion for severance is denied.

Defendant Young also asserts that the extensive nature of the evidence which the prosecution will offer against his co-defendants will have a spillover effect on his case, and that the jury will be unable to separate evidence bearing on his guilt from that pertaining to his co-defendants. Essentially, these are the same arguments made in favor of severance by defendant Rochman. The Court finds that Young's "spillover" argument is no more persuasive than that

made by Rochman, and believes that a properly instructed jury will be able to deal fairly with each defendant. Unlike the defendant in United States v. Mardian, 546 F.2d 973 (D.C. Cir.1976), which he cites, Young is a participant in several of the recordings and tapes which the prosecution will attempt to introduce. As with Rochman, the Court finds no merit in Young's Bruton argument.

In support of his motion to sever, defendant Pariseault merely alleges, in a conclusory fashion, joinder will be prejudicial to him because of the extensive nature of the testimony against his co-defendants and the possibility that they may have inconsistent defenses. The fact that evidence against Pariseault's co-defendants may be stronger than what is offered against him, or the presence of hostility among

Pariseault and his co-defendants are insufficient, without more, to justify severance. Potamitis, supra, 564 F.Supp. at 1486-87.

In addition to his motion to sever, Mr. Pariseault submitted a number of discovery and inspection motions. Most of these requests were disposed of orally by the Court at the October 31, 1983 hearing on the defendants' motions. The motions not disposed of at that time included requests to be furnished with records of electronic surveillance and the photographs viewed by prosecution witnesses, as well as a motion to suppress any recordings or photographic evidence against Mr. Pariseault. The Court assumes that any Brady material or additional discovery material that is required by the defendant to prepare for trial will be provided in accordance with the customary practice in this district.

Defendant's motion to suppress is denied.

Conclusion

The foregoing constitutes the Court's rulings on the motions submitted by each of the alleged contemnors. All of the defendants' motions are denied.

This case is set for a jury trial before this Court on May 14, 1984 at 10:00 a.m. in courtroom 705. All parties and counsel will be ready for trial as of that date.

So ordered.

UNITED STATES DISTRICT COURT
SOUTHRN DISTRICT OF NEW YORK

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VUITTON ET FILS S.A., :

Plaintiff, :

-against- :

KAREN BAGS, INC., JADE HANDBAG CO., INC., SOL N. KLAYMINC and DAVID KASMAN doing business as JADE HANDBAG CO., and JAK HANDBAG INC., :

Defendants, :

-and- :

SLYVIA KLAYMINC and BARRY KLAYMINC, :

Additional Contemnors. :

- x

78 Civ. 5863 (CLB)

FINAL CONSENT JUDGMENT AND PERMANENT INJUNCTION

Plaintiff Vuitton et Fils S.A. ("Vuitton"), having duly commenced this action by filing the complaint herein against defendants Karen Bags, Inc., Jade Handbag Co., Inc., Sol N. Klayminc and

David Kasman doing business as Jade Handbag Co., alleging violations of its rights in connection with its Registered Trade-Mark 297,594; and service of the complaint having been made on December 7, 1978; and defendants Sylvia Klayminc and Barry Klayminc having been joined as contemnors of this Court's order dated December 12, 1978, by orders dated July 8, 1981, and June 22, 1982, respectively; and defendant Jak Handbag Inc., having hereby consented to its joinder as a party defendant; and said defendants having consented to the entry of this judgment and to each and every provision, order and decree hereof; and said defendants having been represented by counsel, whose name appears hereinafter; and

It further appearing that this Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1332, 1338,

15 U.S.C. § 1121 and the principles of pendent jurisdiction;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants Karen Bags, Inc., Jade Handbag Co., Inc., Jak Handbag Inc., Sol N. Klayminc, Sylvia Klayminc and Barry Klayminc and their officers, directors, employees, agents, assigns and successors and all those acting in concert or participation with them be, and they hereby are, permanently enjoined from:

(a) imitating, copying or making unauthorized use of Vuitton's Registered Trade-Mark 297,594;

(b) manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, repro-

duction, counterfeit, copy or colorable imitation of Vuitton's Registered Trade-Mark 297,594;

(c) using any simulation, reproduction, counterfeit, copy or colorable imitation of Vuitton's Registered Trade-Mark 297,594 in connection with the promoting, advertising, display, sale, offering for sale, manufacture, production, circulation or distribution of any product in such fashion as to relate or connect, or tend to relate or connect, such product in any way to Vuitton, or to any goods sold, manufactured, sponsored or approved by, or connected with Vuitton;

(d) making any statement or representation whatsoever, or using any false designation of origin or false description (including, without limitation, any letters or

symbols), or performing any act, which can, or is likely to, lead the trade or public, or individual members thereof, to believe that any product manufactured, distributed or sold by them is in any manner associated or connected with Vuitton, or is sold, manufactured, licensed, sponsored, approved or authorized by Vuitton; and

(e) engaging in any other activity constituting unfair competiton with Vuitton, or constituting an infringement of any of Vuitton's trademarks, or of Vuitton's rights in, or to use or to exploit, said trademarks, or constituting any dilution of the Vuitton name, reputation or goodwill; and

(f) assisting, aiding or abetting any other person or business organization from performing or engaging in the acts and activities referred to in paragraphs (a) through (e) above.

Dated: New York, New York
July 28, 1982

/s/ Mary Johnson Lowe
U.S.D.J.

JUDGMENT ENTERED - 7/30/82

/s/ Raymond F. Burghardt
CLERK

The parties and their respective counsel hereby consent to the terms and conditions of the Final Consent Judgment and Permanent Injunction as set forth above and consent to the entry thereof.

REBOUL, MacMURRAY, HEWITT,
MAYNARD & KRISTON

By /s/ J. Joseph Bainton
A Member of the Firm
Attorneys for Plaintiff
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212)841-5700

BRAND & BRAND

By /s/ [illegible] Brand
A Member of the Firm
Attorneys for Defendants
300 Garden City Plaza
Garden City, New York 11530
Telephone: (516)746-3500

VUITTON ET FILS S.A.

By /s/ J. Joseph Bainton
Authorized Agent

KAREN BAGS, INC.

By /s/ Sol N. Klayminc
President

JADE HANDBAG CO., INC.

By /s/ Sol N. Klayminc
President

JAK HANDBAG INC.

By /s/ Sol N. Klayminc
President

/s/ Sol N. Klayminc
Sol N. Klayminc

/s/ Sylvia Klayminc
Sylvia Klayminc

/s/ Barry Klayminc
Barry Klayminc

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came J. JOSEPH BAINTON, to me known, who, being by me duly sworn, did depose and say that he has full authority to execute this instrument on behalf of Vuitton et Fils S.A., the business organization referred to as plaintiff in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. Devlin
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expries March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, who, being duly sworn, did depose and say that he is the PRESIDENT of KAREN BAGS, INC., and has full authority to execute this instrument on behalf of KAREN BAGS, INC., the business organization referred to as defendant in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. Devlin
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expries March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, who, being duly sworn, did depose and say that he is the PRESIDENT of JADE HANDBAG CO., INC., and has full authority to execute this instrument on behalf of JADE HANDBAG CO., INC., the business organization referred to as defendant in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. Devlin
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expries March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, who, being duly sworn, did depose and say that he is the PRESIDENT of JAK HANDBAG INC., and has full authority to execute this instrument on behalf of JAK HANDBAG INC., the business organization referred to as defendant in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. Devlin
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expries March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, and known to me to be the same person described in and who executed the within instrument and he duly acknowledged to me that he executed the same.

/s/ Robert P. Devlin
Notary Public
ROBERT P. Devlin
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expries March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SYLVIA KLAYMINC, to me known, and known to me to be the same person described in and who executed the within instrument, and she duly acknowledged to me that she executed the same.

/s/ Robert P. Devlin
Notary Public
ROBERT P. Devlin
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expries March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came BARRY KLAYMINC, to me known, and known to me to be the same person described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

/s/ Robert P. Devlin
Notary Public
ROBERT P. Devlin
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expries March 30, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, ex rel., :

VUITTON ET FILS S.A., and LOUIS VUITTON S.A. :

Plaintiffs, :

-against- :

KAREN BAGS, INC., JADE HANDBAG CO., INC., SOL N. KLAYMINC and JAK HANDBAG INC., :

Defendants and Alleged Criminal Contemnors, :

-and- :

BARRY DEAN KLAYMINC, GERALD J. YOUNG GEORGE CARISTE, S.M.E., S.A., CRYSTAL, S.A., DAVID ROCHMAN, ROBERT G. PARISEAULT, ESQ. and NATHAN HELFAND, :

Additional Alleged Criminal Contemnors. :

- x

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ORDER TO SHOW CAUSE

Upon the annexed affidavit of J. Joseph Bainton, Esq., specially-appointed attorney for the United States of

America, and upon all prior proceedings heretofore and herein, it is hereby

ORDERED that alleged criminal contemnor Sol N. Klayminc ("Klayminc, Sr.") SHOW CAUSE before this Court on May 12, 1983 at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of this Court's Final Consent Judgment and Permanent Injunction filed in the underlying civil action on July 30, 1982 (the "injunction") in violation of 18 U.S.C. § 401(3), by reason of the following acts, each such act constituting a separate contempt, to wit:

(a) On or about April 1, 1983, Klayminc, Sr., offered to sell Melvin Weinberg, a government undercover agent using the fictitious name Mel West ("Weinberg") in excess of 1,000 counterfeit Louis Vuitton bags per week

to be manufactured by him and his son, alleged criminal contemnor Barry Dean Klayminc ("Klayminc, Jr."), at a factory owned by them in Haiti. Said factory does business under the names of alleged contemnors S.M.E., S.A. and Crystal, S.A.

(b) On or about April 4, 1983, Klayminc, Sr., offered to sell Weinberg the "best" counterfeit Vuitton fabric available.

(c) On or about April 5, 1983, Klayminc, Sr., sold to Weinberg 25 counterfeit Louis Vuitton satchel handbags for $625.

(d) On or about April 5, 1983, Klayminc, Sr., offered to sell to Weinberg for approximately $76,000 a 50 per cent interest in the Haiti counterfeit factory, which when placed in full operation would manufacture and sell in excess of 1,000 counterfeit Louis Vuitton handbags per week.

(e) On or about April 14, 1983, Klayminc, Sr., and Weinberg met with alleged criminal countemnor Gerald J. Young ("Young") and reached an agreement with Young to purchase an initial $45,000 order for 5,000 yards of counterfeit Vuitton material to be used by the Haitian factory to make counterfeit Louis Vuitton merchandise and thereafter to purchase from Young on a regular basis more substantial quantities of counterfeit Louis Vuitton fabric. Such merchandise was to be manufactured in Japan, transshipped to Hong Kong and then shipped into the United States for transfer to Haiti.

(f) On or about April 7, 1983, Klayminc, Sr., arranged for the purchase by Weinberg from alleged criminal contemnor George Cariste ("Cariste") of in excess of 1,000 counterfeit Louis Vuitton bags.

(g) On or about April 14, 1983, Klayminc, Sr., met with alleged criminal contemnor David Rochman ("Rochman") and Weinberg to discuss purchasing counterfeit Louis Vuitton fabric from Rochman for use in the Haitian operation. Klayminc, Sr., later agreed to purchase such material from Rochman for use in the Haitian operation, as well as finished counterfeit Vuitton goods for resale in the United States.

(h) On or about April 18, 1983, Klayminc, Sr., contracted with Cariste for Cariste to "cut" counterfeit Louis Vuitton fabric furnished by Rochman and to ship such "cut" pieces to his Haitian factory for assembly into counterfeit Vuitton merchandise. Klayminc, Sr., later received such "cut" goods and caused them to be assembled. Klayminc, Sr., willfully engaged in each of the foregoing acts and others with knowledge

of the injunction and wanton disregard thereof. It is further

ORDERED that Klayminc, Jr., SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted for CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. 401(3), by reason of the following acts, each such act constituting a separate contempt, to wit:

(a) On or about April 17, 1983, Klayminc, Jr. represented to Weinberg that he was fully aware of his father's discussions with Weinberg and that he was intimately involved with his father in establishing the Haitian counterfeiting operation as more fully described above and, further, in the event of his father's untimely demise, that he was ready, willing and able to carry on the counterfeiting operations by himself.

(b) On or about April 20, 1983, Klayminc, Jr., and Cariste met with Weinberg at the Plaza Hotel in New York City and discussed Klayminc, Jr.'s full participation in the Haitian counterfeiting scheme. Klayminc, Jr., engaged in each of the foregoing acts and others with knowledge of the injunction and in wanton disregard thereof. It is further

ORDERED that alleged criminal contemnor Gerald J. Young SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be held in CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18. U.S.C. § 401(3), by reason of his offer to sell on or about April 7, 1983, to Klayminc, Sr., and his associates counterfeit Louis Vuitton fabric for use in manufacturing counterfeit Louis Vuitton merchandise

notwithstanding his actual knowledge of (a) the existence of the injunction and (b) the fact that Klayminc, Sr., had already been convicted of criminal contempt of the injunction. It is further

ORDERED that Rochman SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. § 401(3), by reason of the following acts, each such act constituting a separate contempt, to wit:

(a) On or about April 14, 1983, Rochman offered to sell Klayminc, Sr., counterfeit Vuitton fabric for use in the Haitian counterfeiting operation.

(b) On or about April 14, 1983, Rochman offered to sell to Weinberg and

Klayminc, Sr., over 1,000 completed counterfeit Louis Vuitton articles.

(c) On or about April 15, 1983, Rochman offered to sell to Klayminc, Sr., and Weinberg for $550,000 apparatus used to manufacture counterfeit Louis Vuitton fabric. Rochman engaged in each of the foregoing acts and others with knowledge of the injunction and in wanton disregard thereof. It is further

ORDERED that alleged criminal contemnor Robert G. Pariseault, Esq. ("Pariseault"), SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. § 401(3), by reason of his offer in or about April, 1983, to sell for $550,000 to Klayminc, Sr., and Weinberg apparatus used to manufacture counterfeit Louis Vuitton

fabric and over 1,000 counterfeit Vuitton articles notwithstanding his actual knowledge of the existence of the injunction. It is further

ORDERED that alleged contemnor Nathan Helfand ("Helfand") SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. § 401(3), by reason of the following acts, each such act constituting a separate contempt, to wit:

(a) In or about March, 1983, Helfand purchased "samples" of counterfeit Louis Vuitton merchandise from Klayminc, Sr., to show Weinberg.

(b) On or about April 1, 1983, Helfand introduced Weinberg to Klayminc, Sr., for the purpose of facilitating Klayminc, Sr.'s sale to Weinberg of

substantial quantities of counterfeit Louis Vuitton merchandise.

(c) During March and April, 1983, Helfand aided and abetted Klayminc, Sr., in convincing Weinberg to agree to invest in Klayminc, Sr., and Klayminc, Jr.'s Haitian Louis Vuitton counterfeiting operation. Helfand engaged in each of the foregoing acts with others with actual knowledge of the injunction and in wanton disregard thereof. It is further

ORDERED that alleged criminal contemnor George Cariste ("Cariste") SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of this Court's Final Consent Judgment And Permanent Injunction filed in the underlying civil action on July 30, 1982 (the "injunction"), in violation of 18 U.S.C. § 401(3) by reason of the

following acts, each such act constituting a separate contempt:

(a) On or about April 5, 1983, Cariste sold to alleged criminal contemnor Sol N. Klayminc ("Klayminc, Sr.") 25 counterfeit Louis Vuitton handbags;

(b) On or about April 7, 1983, Cariste agreed to sell to Klayminc, Sr., in excess of 1,000 counterfeit Louis Vuitton handbags; and

(c) On or about April 18, 1983, Cariste contracted with Klayminc, Sr., to "cut" counterfeit Louis Vuitton fabric furnished by alleged criminal contemnor David Rochman and to ship such "cut" pieces to Klayminc's Haitian factory for assembly into counterfeit goods. Cariste later shipped such "cut" goods to Klayminc, Sr. in Haiti. Cariste wilfully engaged in each of the foregoing acts and

others with knowledge of the injunction in wanton disregard thereof.

ORDERED that each of the aforesaid alleged criminal contemnors SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why they should not be convicted of CIVIL AND CRIMINAL CONTEMPT in violation of 18 U.S.C. § 401(3) by reason of their aforesaid conduct in concert and participation with Klayminc, Sr., in knowing violation of the injunction.

ORDERED that any United States Marshal or any other authorized officer seize from the following locations:

(1) 91 Buckingham Avenue
Perth Amboy, New Jersey

(2) 503 Division Street
Perth Amboy, New Jersey

(3) 180 Clinton Street
Woodbridge, New Jersey

(4) Encore Handbags
73 Daggett Street
New Haven, Connecticut

(5) Borsetta Fashion Handbags
73 Daggett Street
New Haven, Connecticut; and

(6) LaFila
1031 South Broadway
Suite 804
Los Angeles, California

(7) Bruin Plastic Co., Inc.
Main Street
Glendale, Rhode Island

the things listed below:

(a) all simulations, reproductions, counterfeits, copies or colorable imitations of Registered Trade-Mark 297,594 of Louis Vuitton S.A. ("Vuitton"), including handbags, lugage, material and other merchandise bearing reproduction of said trademark;

(b) all labes, signs, prints, packages wrappers, receptacles and advertisements bearing any simulation, reproduction, copy or colorable imitation of Vuitton's Registered Trade-Mark 297,594;

(c) all plates, molds, machines and other means of making said simulations, reproductions, counterfeits, copies or colorable imitations of Vuitton's Registered Trade-Mark 297,549 [sic];

(d) all books and records relating to the manufacture, distribution, offering for sale and sale of said simulations, reproductions, counterfeits, copies or colorable imitations of Vuitton's Registered Trade-Mark 297,594 and

(e) all other property (i) constituting evidence of conduct which is criminally contumacious of the Final Consent Judgment and Permanent Injunction, filed with the Clerk of the United States District Court for the Southern District Court for the Southern District of New York on July 30, 1982, in the underlying civil action in the above-captioned proceeding, or (ii) designed or

intended for use on which is or has been used as the means of committing said criminal contempt, and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises above described.

Dated: New York, New York
April 29, 1983

/s/ Charles L. Brieant
U.S.D.J.